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No.

In the Supreme Court of the United States

IWAN MANDYCZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Department of Justice brought denaturalization proceedings against Iwan Mandycz, a United States citizen. Mandycz has Alzheimer's Disease, is incompetent, and was unable to meaningfully assist in his defense and assist in preparation for his trial. The lower courts held, *inter alia*: that denaturalization proceedings were civil actions; that the defense of incompetence could not be pled to bar the proceedings; and that the Due Process Clause of the Fifth Amendment of the United States Constitution did not prevent the suit against the incompetent Mandycz. Mandycz's citizenship was revoked by the District Court. If the decision below stands, Mandycz may be removed from the United States, where he has peaceably resided for over 50 years.

1. Does the Due Process Clause of the Fifth Amendment of the United States Constitution prevent Mandycz, an incompetent citizen of the United States, from being tried in denaturalization proceedings?

LIST OF PARTIES

The Petitioner is Iwan Mandycz. He is the Defendant in a denaturalization proceeding in the United States District Court for the Eastern District of Michigan (docket number 00-41048), and he is the Appellant in the Sixth Circuit Court of Appeals (docket Number 06a0172p.06).

Mandycz is incompetent. On January 12, 2001, pursuant to FRCP 17 (c), the District Court appointed the Very Reverend Father Tarcisio Lucavei, O.S.B.M., to act as Mandycz's representative.

Respondent, the United States of America, is the Plaintiff in the District Court and the Appellee in the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review: (i) the February 28, 2005 Opinion and Judgment of the United States District Court for the Eastern District of Michigan; and (ii) the May 22, 2006 Opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion and Judgment of the District Court is reported at 359 F. Supp.2d 601 (E.D. Mi 2005) (docket number 00-41048) (App. 29a and 31a). The Opinion of the Sixth Circuit is reported at 447 F.3d 951 (6th Cir. 2006) (docket Number 06a0172p.06) (App. 1a).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I, section 8, clause 4 of the United States Constitution reads, in part:

> The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . . .
> 8 USC §1451 (a) provides, in part:
> It shall be the duty of the United States attorneys for the respective districts . . . to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

STATEMENT OF THE CASE

The United States Department of Justice has successfully denaturalized an incompetent, United States citizen, forcing him to stand trial in a denaturalization proceeding which has stripped him of his citizenship and could possibly lead to his deportation.

On April 19, 2000, the Criminal Division of United States Department of Justice, through its Office of Special Investigations ("OSI"), filed a Complaint in the United States District Court for the Eastern District of Michigan ("District Court") against Iwan Mandycz ("Mandycz"), now an 86 year old American citizen, for the alleged illegal procurement of United States naturalization in alleged violation of 8 U.S.C. § 1451 (sometimes the "Action").[1]

The events of which OSI complained took place over sixty years ago.[2] OSI had this information in its possession as early

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[1] The United States, the Department of Justice, and OSI are sometimes collectively referred to as the "Government".

[2] R.1, JA 22 (Complaint).

as 1993.[3] By the time the OSI filed the Complaint (2000), however, Mandycz was diagnosed with dementia. Mandycz's health condition continued to deteriorate. In addition to dementia, Mandycz suffers from loss of cognitive function, impairment of memory, and depression associated with Alzheimer's disease.

On January 12, 2001, the District Court appointed a representative for Mandycz pursuant to FRCP 17 (c) principally because: (i) OSI did not challenge the appointment; and (ii) OSI's doctors opined that Mandycz's incompetence and health warranted such an appointment.[4] As a result of Mandycz's incompetence, Mandycz was unable to assist his counsel in any meaningful way (e.g., uncovering exculpatory witnesses or documentary evidence).

Mandycz filed a Motion for Summary Judgment, arguing, *inter alia*, that the Due Process Clause of the Fifth Amendment to the United States Constitution barred the Action because Mandycz is incompetent. On May 1, 2002, the District Court denied the Motion.[5] The District Court appeared to hold that it was compelled by this Court's decision in *Schneiderman v. United States* to apply civil standards to the case; and that traditionally, incompetence was not a defense to a civil action.[6] The District Court also rationalized, applying caselaw from other circuits, that if incompetence does not prevent deportation proceedings, then incompetence, *a fortiori*, does not prevent denaturalization proceedings.[7]

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[3] R.85, JA 81 (Defendant's Motion for Summary Judgment / Ex. "A").

[4] R.35, p. 16, JA 55 (Memorandum Opinion and Order).

[5] R.104, JA 154 (Memorandum Denying Motion for Summary Disposition). *See also United States v. Mandycz*, 199 F. Supp. 2d 671 (E.D. Mi. 2002).

[6] *See* Mandycz, 199 F. Supp. 2d at 675.

[7] *See* Mandycz, 199 F. Supp. 2d at 675.

A bench trial was held from June 14, 2004 through June 17, 2004. The essential question was boiled down to this: Was Mandycz Guard 3308? Mandycz, through his counsel, vehemently contended that the Government had the wrong man. The District Court, however, found that Mandycz was Guard 3308; and on February 28, 2005, the District Court issued its Findings of Fact and Conclusions of Law and entered a Judgment revoking Mandycz's citizenship.[8]

Mandycz appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). The Sixth Circuit requested supplemental briefing on the issue of whether the Due Process Clause precludes the Government's power to try the incompetent Mandycz. The Sixth Circuit affirmed by Order dated May 22, 2006.[9] In so doing, on the due process issue, the Sixth Circuit principally agreed with the District Court that *Schneiderman* held that denaturalization proceedings were civil proceedings and that incompetency is not a defense in this "civil" action.[10]

The Sixth Circuit also held that the above rule was not unfair because: (i) the Federal Rules allow for the appointment of a guardian/representative; and (ii) due process afforded Mandycz the right to an impartial decision-maker to hear and decide the Action.[11]

The Sixth Circuit, however, left open the possibility that due process could, under another factual scenario, require more, but ultimately concluded that Mandycz had been afforded due process because: (i) he was appointed a guardian; (ii) there had been no suggestion that the decision-makers in this case were not impartial; and (iii) that Mandycz could have "assisted in his defense" before he suffered from

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[8] R.217, JA 1826 (Findings and Conclusions).

[9] *See United States v. Mandycz*, 447 F.3d 951 (6th Cir. 2006).

[10] *See* Mandycz, 447 F.3d at 961-62.

[11] *See* Mandycz, 447 F.3d at 962.

dementia (bearing in mind, of course, that the Complaint had not been filed *yet; the Government was* still investigating the claim and simply put Mandycz on notice of its investigation).[12]

Mandycz now petitions this Court for a writ of certiorari. He asks this Court to consider whether the Due Process Clause of the Fifth Amendment to the United States Constitution prevents a United States citizen from being tried in a denaturalization proceeding when the defendant is incompetent.

STATEMENT OF THE FACTS

A. MANDYCZ'S IMMIGRATION TO THE U.S.

Mandycz was born on July 23, 1920, in what is known today as the Ukraine.[13] In 1948, Mandycz, recently married, sought to immigrate to the United States. The International Refugee Organization ("IRO") reviewed Mandycz's application and certified that he was "the concern" of the IRO. The IRO also certified that Mandycz had not assisted in persecuting civilians.[14] Mandycz and his wife were therefore eligible to apply to the Displaced Persons Commission ("DPC") to immigrate to the United States under the Displaced Persons Act of 1948 ("DPA").[15] In November 1949, Mandycz sought a determination from the DPC that he was a displaced person as defined in the DPA, and was therefore eligible to immigrate to the United States.[16]

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[12] *See* Mandycz, 447 F.3d at 963.

[13] Defense Exh. 4 (Birth and Baptismal Certificate) admitted at R.216, Evidentiary Order, JA 336.

[14] Defense Exh. 2 (Mandycz CIC File) admitted at R.216 Evidentiary Order, JA 330.

[15] Defense Exh. 1 (Certificate of Naturalization) admitted at R.216, Evidentiary Order, JA 302.

[16] R.1, Complaint at 6, JA 27.

On November 18, 1949, the United States Army Counter Intelligence Corps ("CIC") conducted an investigation into Mandycz's character and historical background.[17] Under the DPA, Mandycz had the burden of proving eligibility. Mandycz carried this burden.[18] In fact, the CIC investigation revealed nothing sufficiently derogatory to prevent Mandycz's admission into the United States.[19] And significantly, the investigation disclosed no evidence that Mandycz was a member of, or a participant in, any movement which was hostile to the United States or to the form of government of the United States.[20]

The CIC's investigation was thorough and extensive. It included: a fingerprint check; consultation with local, British, French, and Italian security agents; and a review of document files located at the Berlin Document Center.[21] The principal reason the CIC conducted this investigation was to determine whether the Mandycz was a member of an organization inimical to the United States. Among those included were groups that had been involved in the persecution of civilians.[22]

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[17] Government Exh. 25, Dep. Tr. DeCapua at 50-55, admitted at R.137 (Order Granting Admissibility of DeCapua Deposition), JA 262.

[18] The Government's own witness, Mario DeCapua (former Chief of Security for the DPC) admitted that Mandycz satisfied the burden of proving his eligibility. Government Exh. 25, Dep. Tr. DeCapua at 54, admitted at R.137 (Order Granting Admissibility of DeCapua Deposition) JA 266.

[19] Defense Exh. 2 (Mandycz CIC File) admitted at R.216, Evidentiary Order, JA 330.

[20] Defense Exh. 2 (Mandycz CIC File) admitted at R.216, Evidentiary Order, JA 330.

[21] Government Exh. 25, Dep. Tr. DeCapua at 49-55, admitted at R.137, Order Granting Admissibility of DeCapua Deposition, JA 261.

[22] Government Exh. 25, Dep. Tr. DeCapua at 49-55, admitted at R.137, Order Granting Admissibility of DeCapua Deposition, JA

The CIC concluded Mandycz had not been involved in such activities.

Mandycz's application then passed to the DPC. A DPC analyst reviewed the application and all relevant documentation, including the CIC investigation report. Following the analyst's review, the DPC determined the Mandycz was an eligible displaced person under the DPA.[23]

On December 1, 1949, Mandycz filed an Application for Immigration Visa and Alien Registration with the American Consulate in Salsburg, Austria. On December 2, 1949, Mandycz entered the United States pursuant to an Immigration Visa.[24]

On May 13, 1955, Mandycz filed a Petition for Naturalization with the United States Immigration and Naturalization Service. On June 30, 1955, Mandycz's Petition was granted, and he was issued a Certificate of Naturalization.[25]

A model citizen, a hard worker, and a family man, Mandycz has peaceably resided in the Detroit metropolitan area ever since.

B. THE PROSECUTION OF MANDYCZ.

About forty-five years after Mandycz entered the United States, OSI filed a Complaint seeking to denaturalize him. The charge: alleged illegal procurement of United States naturalization in violation of 8 U.S.C. § 1451,[26] based on events which allegedly took place over 60 years ago. By the time the Complaint was filed, Mandycz was diagnosed by his treating physicians as suffering from dementia and

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261.

[23] R.1, pp. 6-7, JA 27-28 (Complaint).

[24] R.1, p. 7, JA 27 (Complaint).

[25] R.1, p. 7, JA 27 (Complaint).

[26] R.1, JA 22 (Complaint).

Alzheimer's disease.[27] Early on in the District Court proceedings, Mandycz was examined at length by several doctors retained by OSI. The Government's doctors opined that the Mandycz had Alzheimer's disease and was not competent to stand trial:

> While at this time Mr. Mandycz does appear to have some rudimentary understanding of the nature and object of the proceedings against him, and while he does appear interested in his defense, **the cognitive and especially memory deficits he currently demonstrates can be expected to have an adverse impact on his ability to assist properly in his defense. He will likely find it difficult to follow and understand proceedings as they are occurring, and remember what has occurred, even after brief periods of time. Fatigue will add to confusion. Choices and judgments that will be required will be difficult for him to make in a knowing and intelligent manner. As time goes on, these abilities he will need to call upon in assisting in his defense, such as they are at the present time, will deteriorate.**
>
> In the final analysis, Mr. Mandycz could be deemed competent at the present time only if nothing more is required of him than to be physically present in Court, answer questions about his past to the extent that he maintains memory, and to be passively compliant with decisions made by others on his behalf. These are all things he can do. **This does not appear sufficient to meet legal requirements for competency to stand**

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[27] R.85, JA 110 (Defendant's Motion for Summary Disposition—Appendix/ Medical Exhibits). His official diagnosis was rendered on June 5, 2000. R. 85, JA 142.

trial, however: Mr. Mandycz appears to be incompetent.[28]

Relying on the above testimony, the District Court exercised its FRCP 17 (c) authority and appointed a representative for Mandycz.[29] This was significant for purposes of whether Mandycz was incompetent. The plain language of Rule 17 *only* permits the appointment of a representative for "Infants or Incompetent Persons."[30]

Mandycz's health condition worsened as the litigation wore on. In fact, Mandycz was deteriorating: he suffered from dementia, loss of cognitive function, impairment of memory, depression, and other ailments associated with Alzheimer's disease.[31] As a result, Mandycz was unable to assist his counsel in uncovering exculpatory witnesses or documentary evidence or to assist in any meaningful way at any stage of litigation. Preparing a defense without Mandycz's assistance was challenging to say the least. The

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[28] R.85 Defendant's Motion for Summary Judgment / Appendix A: Item 5, Apx. 133 (Emphasis added).

[29] R.35, p. 16, JA 55 (Memorandum Opinion and Order). Mandycz's representative is the Very Reverend Father Tarcisio Lucavei.

[30] Since the District Court held that denaturalization proceedings inhered no right to assert the defense of incompetency, no evidentiary hearing was held on the issue of Mandycz's incompetence. "The test for incompetence is also well settled. A defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." *Cooper*, 517 U.S. 348, 354 (1996) (internal quotes and citation omitted). The Government's own doctors admitted that Mandycz was incompetent to stand trialt. At bottom, Mandycz requests an evidentiary hearing on the incompetency issue.

[31] R.85, Appendix A, Items 1-14, JA 110 (Defendant's Motion for Summary Judgment).

events alleged to have occurred took place some 60 years ago, in a foreign country, during World War II. The country where Mandycz was born does not even exist anymore.

The Government, on the other hand, had unlimited time and resources to prepare its prosecution in order to eviscerate every legal, civil, and constitutional right Mandycz possessed. It was the full investigatory power of the OSI vs. a confused, sick old man. The stakes: every right Mandycz had as an American citizen, and the possibility of removal from the United States.

SUMMARY OF THE ARGUMENT

Mandycz petitions this Court to consider whether the procedural or substantive components of the Due Process Clause of the Fifth Amendment of the United States Constitution prevent the United States from bringing denaturalization proceedings against him. Mandycz is an incompetent United States citizen.

Part A sets forth the standard of review. The issue presented involves the interpretation of the United States Constitution. Review is *de novo*.

In Part B, we cite authority supporting the inveterate and uncontroversial rule of constitutional law that the due process clauses of the Fifth and Fourteenth Amendments prevent the Federal and state governments from trying an incompetent citizen in a criminal trial. That rule is predicated on our traditional notions of fairness; that the accused should be able to assist in the preparation of his defense and consult with his attorneys before he may be punished by the government.

In Part C, we ask this Court to grant certiorari to consider whether the same protection afforded incompetent *criminal* defendants should apply to incompetent defendants in *denaturalization* proceedings. In support, we cite several decisions of this Court which have acknowledged: (i) the unique and important nature of the rights decided in

denaturalization cases; (ii) how those same decisions apply markedly different legal standards in denaturalization cases as opposed to the standards applied in ordinary civil cases; (iii) how the standards applied in denaturalization cases are oftentimes more consistent with the standards applied in a criminal case; and (iv) how the sanction of the denaturalization case (loss of citizenship) rivals, if not exceeds, the punishment ordinarily bestowed on criminal defendants (ordinarily some jail time).

In Part D, we attempt to assure this Court that the rule we seek does not conflict or challenge Congress's Article 1 Naturalization power. We argue that any exercise by Congress of an Article I power cannot independently violate another, indeed later in time, constitutional provision: in this case, the Due Process Clause. We argue that Congress's authority to enact 8 USC § 1451 did not include the power to try incompetent citizens in denaturalization cases, because the same would violate the procedural or substantive protections of the Due Process Clause.

In Part E, we argue that the facts of this case present the appropriate opportunity to consider the issue presented. The Government's case against Mandycz was almost entirely circumstantial, and was based on 50-60 year old, sketchy Soviet and Nazi documents and interrogation protocols. This was a case based entirely on circumstantial evidence; the events alleged to have occurred took place roughly 60 years ago; there was the chaos of war; Mandycz, like millions of others, was in the middle of it; and Mandycz's intent to mislead was a dispositive issue that confronted the fact-finder. This case is an ideal opportunity to consider just how important --- indeed critical --- client/attorney interaction and preparation is.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION SHOULD BE UNDERSTOOD TO PREVENT THE UNITED STATES FROM BRINGING DENATURALIZATION PROCEEDINGS AGAINST AN INCOMPETENT DEFENDANT.

A. Standard of Review.

The District Court and the Sixth Circuit held that the Fifth Amendment did not prevent the United States from trying the incompetent Mandycz in a denaturalization proceeding.

Review of this constitutional question is *de novo*.[32]

B. THE FIFTH AND FOURTEENTH AMENDMENTS PREVENT THE FEDERAL AND STATE GOVERNMENTS FROM TRYING INCOMPETENT PERSONS IN CRIMINAL PROCEEDINGS.

The Fifth Amendment reads, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . (*hereinafter sometimes* Due Process Clause).[33]

The Fourteenth Amendment reads, in part: "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law."[34]

This Court has recognized that due process inheres two types of protections from government action: procedural and substantive.[35] "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process

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[32] *Cf. generally Elder v. Holloway*, 510 U.S. 510, 516 (1994).

[33] U.S. CONST., amend. V.

[34] U.S. CONST., amend. XIV.

[35] *See United States v. Salerno*, 481 U.S. 739, 746 (1987).

Clause of the Fifth or Fourteenth Amendment."[36] "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[37] "[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[38]

The substantive component bars government action regardless of the fairness of the procedures used. Substantive due process prevents one from being subjected to an arbitrary act of government that "shocks the conscience"; does not comport with "traditional notions of fair play and decency"; and/or interferes with rights "implicit in the concept of ordered liberty."[39]

This Court has held that due process clauses of the Fifth and Fourteenth Amendments preclude the government from trying an incompetent person in a criminal trial:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.[40]

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[36] *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

[37] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[38] *Mathews*, 424 U.S. at 335.

[39] *See* County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1997) (surveying Supreme Court substantive due process jurisprudence).

[40] *Drope v. Missouri*, 420 U.S. 162, 172 (1975). *See also* Godinez v. Moran, 509 U.S. 389, 396 (1993) ("A criminal defendant may not be tried unless he is competent."); *Pate v. Robinson*, 383 U.S.

The reasons for this rule touch the most basic concept of due process, *to wit*, the manner in which the government may affect, restrict, or even terminate a citizen's freedom. This Court has recognized that "the prohibition is fundamental to an adversary system of justice."[41] In fact, the rule's pedigree is older than the Republic itself.[42] And as Justice Kennedy has stated:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.[43]

C. Mandycz requests that this Court issue a writ of certiorari to consider whether the same protection afforded criminal defendants should be extended to defendants in denaturalization proceedings.

The denaturalization proceeding instituted against the incompetent Mandycz violates the procedural or substantive components of the Due Process Clause. As demonstrated above, these protections have been found to protect incompetent defendants in *criminal* proceedings. Mandycz petitions this Court to consider whether the same protections should be afforded incompetent defendants in *denaturalization* proceedings.

375, 378 (1966); *Accord*, *Dusky v. United States*, 362 U.S. 402 (1960) (federal prosecutions); 18 USC § 4241.

[41] *Drope*, 420 U.S. at 172.

[42] *Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996).

[43] *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring).

In *Schneiderman v. United States*, this Court, in *dicta*, recognized the unique nature of the denaturalization proceeding; that it is neither a criminal proceeding, nor is it truly civil:

> A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status.[44]

As such, "because of the grave consequences incident to denaturalization proceedings", this Court has required the Government to prove its case with evidence that is "clear, unequivocal, and convincing" and "not leave the issue . . . in doubt."[45] This Court has held that the above standard is essentially *the same* as the standard in *criminal* proceedings (proof beyond reasonable doubt):

> This burden is **substantially identical with that required in criminal cases** -- proof beyond a reasonable doubt. The same factors that caused us to require proof of this nature as a prerequisite to denaturalization judgments in hearings with the defendant present, **apply at least with equal force to**

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[44] *Schneiderman v. United States*, 320 U.S. 118, 160 (1943). *See also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.").

[45] *Klapprott*, 335 U.S. 601, 612 (1949); *Schneiderman*, 320 U.S. at 125. *See also Chaunt*, 364 U.S. at 353; *Costello v. United States*, 365 U.S. 265, 269 (1961). The Fifth Circuit has interpreted this language to also require proof that is "overwhelming." *Meyer v. United States*, 141 F.2d 825, 826-27 (5th Cir. 1944).

> **proceedings in which a citizen is stripped of his citizenship rights in his absence.**[46]

Denaturalization defendants are afforded the benefit of every reasonable inference in the trial court and are accorded similar treatment on appeal. In denaturalization proceedings, "[T]he facts and the law should be construed as far as is reasonably possible in favor of the citizen."[47] And on appeal, the record should be scrutinized very closely:

> The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here, for we deal with judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.[48]

This is in stark contrast to the treatment of factual findings in the trial court in both traditional civil *and* criminal cases, where factual findings are set aside only if they are "clearly erroneous."[49]

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[46] *Klapprott v. United States*, 335 U.S. 601, 612 (1949) (emphasis added).

[47] *Schneiderman*, 320 U.S. at 122.

[48] *Chaunt*, 364 U.S. at 352 (internal quotes and citation omitted). *See also Fedorenko v. United States*, 449 U.S. 490, 506 (1981) ("[I]n reviewing denaturalization cases, we have carefully examined the record ourselves."); *Nowak v. United States*, 356 U.S. 660, 663 (1958) ("And in a case such as this it becomes our duty to scrutinize the record with the utmost care."); *Baumgartner*, 322 U.S. at 673-75. This portion of *Baumgartner* was considered by this Court in *Pullman-Standard, Div. of Pullman v. Swint*, 456 U.S. 273, 286 (1982).

[49] FED. R. CIV. P. 52 (a) (civil); 18 USC § 3742 (e) (criminal); The First Circuit has held that it is a *per se* abuse of discretion to enter a default judgment against a defendant in a denaturalization proceeding for failure to comply with an order under FRCP 37. *See United States v. Klimavicius*, 847 F.2d 28, 35 (1st. Cir.

This Court has also acknowledged that the "unusual[ly] coercive action"[50] of denaturalization proceedings "involve tremendously high stakes for the individual."[51]The stakes in a denaturalization proceeding are a lot like those in criminal proceedings. A criminal conviction is the judgment of the "group" that an autonomous "one" must be physically removed from society, and placed in an iron cell. A denaturalization decision casts a similar fate, if not a worse one. It is effectively the judgment that one must be removed not only from American life and society, but the *country*; the denaturalized defendant is no longer even "one of us."[52]

In many respects, being denaturalized is worse than being criminally convicted. More than likely, a defendant who is denaturalized will lose every single legal right he enjoys as an American. Even convicted criminals retain certain of their legal rights, even constitutional ones; and, chances are, they will get out of jail at some point or be paroled. By significant contrast, the fate of Mandycz is one that we do not bestow on America's murderers, rapists, and pedophiles. The Third Circuit has recognized this tension:

> Technically, we are not administering the criminal law in this case. But we are concerned with the administration of a sanction which in effect is gravely penal. A fine or imprisonment is the normal criminal penalty. But loss of citizenship is a far graver penalty than most fines and many prison sentences.[53]

1988).

[50] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989).

[51] *Knauer*, 328 U.S. at 659.

[52] The denaturalized defendant loses any legal right to stay within the borders of the United States. The upshot is that, most of the time, his removal is a *fait accompli*.

[53] *United States v. Minker*, 217 F.2d 350, 352-53 (3rd Cir. 1954), *aff'd* 350 U.S. 179 (1956).

The Southern District of New York shared a similar view in *United States v. Costello*.[54]

There are more parallels. Both the conviction and denaturalized individual face severe social opprobrium. The District Court of New Jersey has recognized this specifically in the context of World War II:

> Denaturalization proceedings based on charges of World War II war crimes carry with them consequences far more severe than the penalties imposed in most criminal cases. Not only is a defendant threatened with loss of his citizenship; he faces deportation to a hostile jurisdiction having safeguards and procedures far different from our own where he may be tried and sentenced to imprisonment and even execution.[55]

This is the reality Mandycz might face if he is denaturalized and removed. As this Court is likely aware, after this Court decided *Fedorenko v. United States*, Feodor Fedorenko was deported to the former Soviet Union. Fedorenko was hanged.[56]

This Court has held that "denaturalization . . . may result in the loss of all that makes life worth living."[57] And in that

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[54] *United States v. Costello*, 144 F. Supp. 779, 781 (S.D.N.Y 1956).

[55] *See* United States v. Kungys, 575 F. Supp. 1208, 1211 (D. N.J. 1983).

[56] See *Soviet Reports it Executed Nazi Guard U.S. Extradited*, N.Y. TIMES, July 28, 1987. http://select.nytimes.com/gst/abstract.htm?res=F40710F734540C7B8EDDAE0894DF484D81&n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fW%2fWar%20Crimes%2c%20Genocide%20and%20Crimes%20Against%%20Humanity.

[57] *Knauer v. United States*, 328 U.S. 654, 659 (1946) (quotes and citation omitted). *See also United States v. Minker*, 350 U.S. 179, 187 (1956); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("American citizenship . . . is 'one of the most valuable

sense, the denaturalization proceeding is truly *sui generis*. Whether we afford constitutional protections in a trial should not be based on a dogmatic "criminal" or "civil" label. The touchstone is whether what is at stake is "punishment." Is what Mandycz faces "punishment" in the constitutional sense? Because if it is, he is entitled to the panoply of safeguards the Constitution affords.[58] Mandycz argues that the sanctions he faces are "punishment" in every sense of the word.[59] To the extent this Court may have held to the contrary, Mandycz requests that this Court re-examine that position in light of Mandycz's circumstances.[60]

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rights in the world today.'", *quoting* Report of the President's Commission on Immigration and Naturalization (1953), p. 235).

[58] *See Mendoza-Martinez*, 372 U.S. at 167 ('If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.").

[59] In the case below, the Government argued that the sanction Mandycz faces is not "punishment" because it "works to deprive the naturalized citizen of a privilege that should never have been bestowed." *United States v. Kairys*, 782 F.2d 1374, 1383 (7th Cir. 1986). This is frustratingly circular. Example: In criminal cases, we afford defendants the presumption of innocence. *See Estelle v. Williams*, 425 U.S. 501, 503 (1975). One could argue that when a person is indicted, he should lose that presumption, because if the state/government prevails at trial, one was never entitled to the presumption in the first place! The reality is that Mandycz is a citizen up until the time his citizenship is revoked; until that time, he should be treated like every other American.

[60] We acknowledge a long line of caselaw which has held that denaturalization is not traditional punishment; that it merely takes back something which never should have been bestowed. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 98-99 (1958) (Plurality Opinion of The Chief Justice).

Consistent with the above ideas, this Court (as demonstrated above) has treated denaturalization proceedings markedly different from ordinary civil proceedings because "the right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences."[61] And it is for that reason that Mandycz requests that this Court extend the incompetency defense, ordinarily reserved for "criminal" trials, to the denaturalization trial.[62]

From a procedural due process standpoint, the above discussion demonstrates that the first two of the factors set forth in *Mathews v. Eldridge* weigh substantially in Mandycz's favor. While we acknowledge the Government's interest in protecting the integrity of the naturalization process, it is difficult to articulate the Government's interest in this case. At a minimum, we request certiorari to have this Court consider it.

From a substantive standpoint, for the reasons articulated herein and *infra* (Section E specifically), stripping a citizen of all his legal rights when he cannot even appreciate, let alone defend against, the charges levied against him could rise to

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[61] *Fedorenko*, 449 U.S. at 505. *See also Costello v. United States*, 365 U.S. 265, 269 (1960) ("American citizenship is a precious right. Severe consequences may attend its loss, aggravated when the person has enjoyed his citizenship for many years."). As stated earlier, Mandycz has been in this country for over 50 years.

[62] In addition to the effective extension of the "reasonable doubt standard" to the denaturalization proceeding, *see Klapprott*, 335 U.S. at 612, the Sixth Circuit extended this Court's "Brady rule" relating to exculpatory evidence to cases involving certain denaturalization proceedings. See *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993), *citing Brady v. Maryland*, 373 U.S. 83, 87 (1994). Mandycz, with candor, concedes that this is likely the minority view. *See United States ex rel.* [Redacted] v. [Redacted], 209 F.R.D. 475, 482 (D. Utah 2001).

the level that "shocks the conscience" and offends notions of fair play and what is decent. We also contend that the prosecution of the incompetent Mandycz not only "interferes" with rights "implicit in the concept of ordered liberty" --- but it could mean that he will lose *all of his rights* without an understanding of the proceedings. While substantive due process protection from government action is ordinarily reserved for only the most fundamental of rights, we believe those rights are implicated here and the manner in which the Government seeks to strip Mandycz of those rights is fundamentally unfair.

In closing, Mandycz quotes at length Justice Rutledge's passionate and persuasive concurring opinion in *Klapprott*. It really highlights the stakes involved and what is happening to Mandycz. We ask the Court to juxtapose what follows below with the sad predicament one faces with Alzheimer's:

> To treat a denaturalization proceeding, whether procedurally or otherwise, as if it were nothing more than a suit for damages for breach of contract or one to recover overtime pay ignores, in my view, every consideration of justice and of reality concerning the substance of the suit and what is at stake.
>
> To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. **Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.**

* * *

> [T]he Schneiderman decision and Baumgartner v. United States required a burden of proof for denaturalization which in effect approximates the burden demanded for conviction in criminal cases, namely, proof beyond a reasonable doubt of the charges alleged as cause for denaturalization. This was in itself and to that extent recognition that ordinary civil procedures, such as apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences. More than this it was not necessary to decide in the cases cited. No less should be required, in view of the substantial kinship of the proceedings with criminal causes, whatever their technical form or label.
>
> * * *
>
> I cannot assent to the idea that the ordinary rules of procedure in civil causes afford any standard sufficient to safeguard the status given to naturalized citizens. If citizenship is to be defeasible for naturalized citizens, other than by voluntary renunciation or other causes applicable to native-born citizens, the defeasance it seems to me should be surrounded by no lesser protections than those securing all citizens against conviction for crime. **Regardless of the name given it, the denaturalization proceeding when it is successful has all the consequences and effects of a penal or criminal conviction, except that the ensuing liability to deportation is a greater penalty than is generally inflicted for crime.**[63]

Mandycz is no less a citizen than anyone who is natively born in the United States, save he cannot become President.[64]

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[63] *Klapprott*, 335 U.S. at 616-19 (Rutledge, J., concurring).

[64] *Schneider v. Rusk*, 377 U.S. 163, 165 (1964). *See also Luria v. United States*, 231 U.S. 9, 22 (1913) ("Under our Constitution, a

Before Mandycz is stripped of this precious right, he should have had the opportunity to defend himself.[65] This was never about sympathy. We don't ask for sympathy. Just a fair fight.

This wasn't a fair fight.

We respectfully request a writ of certiorari on Iwan Mandycz's behalf.

D. THE RELIEF PETITIONER SEEKS DOES NOT CONFLICT WITH CONGRESS'S POWER OVER NATURALIZATION, BECAUSE CONGRESS CANNOT USE ITS ARTICLE I, SECTION 8 POWERS TO INDEPENDELY VIOLATE ANOTHER, LATER IN TIME CONSTUTUTIONAL PROVISION: IN THIS CASE, THE DUE PROCESS CLAUSE.

The States gave Congress the authority "To establish an uniform Rule of Naturalization . . . ."[66] Congress enacted 8 USC § 1451 (the statute particularly relevant to Mandycz's trial) pursuant to this constitutional grant and through necessary and proper clause.[67]

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naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.").

[65] This Court discussed the gravity of the inevitable implication of denaturalization in *Mendoza-Marinez*: ("An expatriate who, like Cort, had no other nationality becomes a stateless person -- a person who not only has no rights as an American citizen, but no membership in any national entity whatsoever. . . . The stateless person may end up shunted from nation to nation, there being no one obligated or willing to receive him."). *Mendoza-Martinez*, 372 U.S. at 160-61.

[66] U.S. CONST., art. 1, § 8, cl. 4.

[67] *See* Knauer, 328 U.S. at 673 ("The Constitution grants Congress power 'To establish an uniform Rule of Naturalization . . .' Article I, § 8. The power of denaturalization comes from that provision and the 'necessary and proper' Clause in Article I, § 8.").

This Court has required strict compliance with the mandates of Section 1451 because "Congress alone has the constitutional authority to prescribe rules for naturalization."[68] The relief sought by Mandycz, however, will not tread on Congress's authority. We challenge Congress's naturalization authority only to the extent we believe it offends due process for a citizen to have his citizenship revoked in a denaturalization proceeding when that citizen is incompetent.[69] Congress cannot use its powers to independently violate the Constitution.[70] And in this case, we argue that its exercise as applied to Mandycz violated due process.[71]

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[68] *Fedorenko*, 449 U.S. at 506

[69] *Compare Mendoza-Martinez*, 372 U.S. at 164-65 ("It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process.").

[70] *See King v. Smith*, 392 U.S. 309, 333 & n.4 (1968). The same is justified, in part, by *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on . . . .").

[71] To the extent there even could be a conflict between the Fifth Amendment and the naturalization clause, *see* U.S. Const., art. 1, § 8, cl. 4, the Fifth Amendment was ratified (officially December 15, 1791 after Virginia's ratification) after the Constitution was ratified (officially June 21, 1788, New Hampshire is ninth State to ratify). Ordinarily, a latter provision controls over an earlier provision to the extent there is a conflict. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976) (Congress may use its Section 5 powers under the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity.).

For example, Congress undoubtedly has plenary and exclusive authority to coin money.[72] And while Congress may provide for criminal penalties for the making of counterfeit money,[73] Congress probably could not use the same power to incarcerate an incompetent violator under the theory that it is exercising a plenary Section 8 power; that would offend due process.[74] The same logic extends to this case.

Were it any other way, the promise of the due process clause could be effectively vitiated by an act of Congress pursuant to a Section 8 power. The positive and dormant aspects of the commerce clause along with the supremacy clause, for example, combine to make the commerce power plenary. Given the expansive breadth of the commerce power, Congress in theory could use the same to vitiate *any number of* the protections afforded by the Bill of Rights. That's inconsistent with the design of the Constitution (and Fifth and perhaps Ninth and Tenth Amendments). As such, despite the plenary aspects of certain of Congress's authority, the same must cede to the Due Process Clause. The ruling Mandycz requests is consistent with that principle.

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[72] *See* U.S. CONST., art. 1, § 8, cl. 5.

[73] *See* U.S. CONST., art. 1, § 8, cl. 6.

[74] *Cf. Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992) (Congress cannot use the Commerce Clause to the extent the action violates the due process clause).

E. THIS CASE PRESENTS AN APPROPRIATE OPPORTUNITY TO CONSIDER THE ISSUE PRESENTED ABOVE. IN ORDER TO PREPARE AND DEFEND AGAINST OSI'S CHARGES (SUPPORTED ONLY BY CIRCUMSTANTIAL EVIDENCE), CLIENT ASSISTANCE WAS CRITICAL BECAUSE THE EVENTS OF WHICH OSI COMPLAINED OCCURRED IN A FOREIGN COUNTRY, IN THE MIDST OF WAR-TORN EUROPE, OVER 60 YEARS AGO.

The claimed events allegedly occurred over 60 years ago in a foreign country when the world was at war. And in support of its case, the only evidence produced by OSI was circumstantial. If there were ever a case where a defendant could have provided his attorneys substantial assistance in preparing a defense, it's this one.

The Government failed to produce *any* direct proof that Mandycz committed *any* wrongful act. The case, in fact, was almost entirely circumstantial. There was no eyewitness testimony as to Mandycz's whereabouts and activities during World War II or as to Mandycz's naturalization process. Furthermore, Mandycz never admitted to any of the allegations that OSI brought against him.[75] The Government's case relied on fragments of (alleged to be) German wartime documents and inherently unreliable and contradictory Soviet-era "interrogation protocols" allegedly authored in 1947 and 1948. In addition, OSI failed to produce the following:

- Trawniki personnel file or personnel sheet for Mandycz (R.177, Dr. Black, Trial at 92, JA 2176);
- Identification cards of Mandycz from any concentration camps (R.178, Dr. Black, Trial at 78, JA 2306);
- Documents containing Mandycz's signature (R.178, Dr. Black, Trial at 77, JA 2305);
- Records showing that Mandycz received pay (R.177, Dr. Black, Trial at 95, JA 2179);

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[75] R. 178, Dr. Black, Trial at 77, JA 2305.

- A photograph of Mandycz in uniform (R.177, Dr. Black, Trial at 92, JA 2176);
- Photos or records showing Mandycz received a uniform (R.177, Dr. Black, Trial at 94, JA 2178);
- Photos or records showing that Mandycz received or carried a weapon. (R.177, Dr. Black, Trial at 94, JA 2178).
- Fingerprints of Mandycz. (R.178, Dr. Black, Trial at 78, JA 2306);
- Blood-type tattoo on Mandycz (Government Exh. 123, admitted at R.216, Evidentiary Order, JA 1604);

Given the circumstantial nature of the "proofs" offered by the Government, meaningful participation by Mandycz in uncovering exculpatory witnesses or documentary evidence could have made a substantial difference in the outcome of the trial.

Example. Mandycz's application to the DPC was transcribed by a DPC officer.[76] Mandycz's work history listed "Firma Seuring" (translated, "Seuring Company") as a place where Mandycz worked. The Government's research uncovered no plant called Seuring. From that, the Government concluded that Mandycz was lying. The District Court appeared to accept the Government's explanation.[77]

"Seyring", however, *does* exist --- it's a city in Austria.[78] The Seuring to which Mandycz was referring (phonetically) could have been a plant *in* Seyring, not *the plant of* "Seuring". Unfortunately, counsel for Mandycz could not confer with Mandycz to get a better understanding of the

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[76] Plaintiff Exhibit 5, admitted at R. 216, JA 538 (CIC files for Mandycz) (original application); Plaintiff Exhibit 5, admitted R. 216 (CIC files for Mandycz), JA 543 (translated application).

[77] R. 178, Dr. Black, Trial at 75, JA 2303; R. 217, JA at 1844 (Findings of fact and conclusions of law).

[78] R. 178, Dr. Black, Trial at 72, JA 2300.

context in which the statement in the application was made. Mandycz, in fact, might have been able to explain everything. But since he had Alzheimer's, he could not remember. That did not make Mandycz a liar; *it meant he had Alzheimer's; **and he couldn't remember***.

This is illustrative of the incredible evidentiary burdens Mandycz's counsel faced as a result of Mandycz's Alzheimer's. The unavoidable conclusion is that Mandycz may be removed, at least in part, because he has Alzheimer's. That's just not right.

All together, considering the incredible temporal, historical, geographical, and political obstacles a defendant faces, these types of cases are difficult enough. Mandycz's incompetence, however, made the task disproportionately difficult and virtually impossible.

For these reasons, this case presents uniquely appropriate circumstances to consider the question presented at the beginning of this Petition. This was a highly circumstantial, fact-intensive case, involving issues of intent, covering events that occurred 60 years ago, in another country (that does not exist anymore), during the fog of war.

The Sixth Circuit might have been persuaded that the appointment of a representative somehow mollified the fact that Mandycz was not able to assist in his defense. In certain cases, the appointment of a guardian can have a positive, substantive impact. For example, if a minor receives a substantial settlement in litigation, the appointment of a guardian to look after the child's interests (through, e.g., a conservatorship) can be critical. Or the appointment of a guardian to handle the affairs (e.g., bills, debts, mortgage payments) of an aging widow can be essential. Under those circumstances, the fact that the incompetent cannot assist the conservator/ guardian /representative does not (or has very little) impact the incompetent's rights.

Those examples stand in significant contrast to this case. Reverend Lucavei is a priest who knew Mandycz from church. Reverand Lucavei, by any account, is a wonderful man. However, he could not provide Mandycz's counsel to recount acts that Mandycz was alleged have done 60 years ago. He could not assist in any meaningful fashion to flesh out the substantive allegations in this case. Mandycz's attorney needed to hear from Mandycz *himself*, uncorrupted by disease and gaps in lucidity. Did Mandycz know of or could he have contacted witnesses? Could he have assisted in uncovering exculpatory documents? We'll never truly know. But one should not lose one's status as an American citizen because of an uncontrollable disease of the mind.

The Sixth Circuit also seemed persuaded because there had been no allegation that the District Court Judge was not impartial. An impartial decision maker is, of course, critical to the integrity of any system of justice. The key right implicated in this case, however, was the ability to assist one's attorneys in this highly-factual inquiry. Certain constitutional rights bear more heavily depending on the case.[79] As applied to this case, however, an impartial decision-maker afforded no help to counsel trying to understand what happened sixty years ago when one's client cannot --- *medically cannot* --- remember.

On a final point, the Sixth Circuit noted that Mandycz was "able to assist" in his defense "in 1996." With due respect to the Sixth Circuit, there was no "legal" defense to be asserted in 1996. The Complaint was not filed until 2000. And

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[79] Under the Sixth Amendment, one has the right to counsel in a proceeding where jail time is a possibility. That right means very little to Bill Gates, but it can be the difference between life and death for an indigent person. Yet in the same case, the Fifth Amendment's right against self-incrimination may mean everything to Gates, but perhaps be entirely irrelevant to the indigent.

Mandycz had been diagnosed with dementia by then. The Sixth Circuit's approach is at least circular and seemingly unfair. If we view the right of assistance and consultation with counsel as the period of *pre-competence*, then incompetence might *never* be a defense. That interpretation could gut the promise of the Fifth Amendment in the case of someone like Mandycz. It also faults Mandycz for failing to have the *foresight* to anticipate that his government would try to denaturalize him after he had been living in the United States for 40 years based on events that occurred some 50 years ago. We should all have that kind of clairvoyance.

CONCLUSION

For the foregoing reasons, Petitioner Iwan Mandycz respectfully requests that this Court grant his Petition for certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-1424

[Filed May 22, 2006]

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
IWAN MANDYCZ,)
Defendant-Appellant.)

Appeal from the United States District Court
for the Eastern Disctrict of Michigan at Flint.
No. 00-40148
Paul V. Gadola, District Judge.

Before: SUTTON and GRIFFIN, Circuit Judges; OBERDORFER, District Judge.*

OPINION

* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

SUTTON, Circuit Judge. Iwan Mandycz challenges the district court's determination that he "illegally procured" his naturalization as an American citizen by failing to acknowledge his service as a prison guard in two concentration camps during World War II. *See* 8 U.S.C. § 1451(a). In bringing this challenge, he argues that the denaturalization order is not supported by the evidence, that the trial violated his due process rights, that laches barred the government from bringing this action and that the court erred in admitting certain evidence under the ancient-documents exception to the hearsay rule. We affirm.

I.

On January 23,1920, Iwan Mandycz was born in Olievo-Korolivka, a small village located in what was then Poland, for a time was Nazi Germany, for a longer time was the Soviet Union and is now Ukraine. In the summer of 1941, as part of Operation Barbarossa, Nazi Germany took control of Poland and, with it, Olievo-Korolivka.

As the war began to turn against Germany in 1942 and 1943, the country committed increasing numbers of troops to the eastern and western fronts, forcing it to recruit Eastern Europeans to fill positions vacated by the mobilized Germans. From February to April 1943, various SS units ("Schutzstaffel" or "protection squads," JA 2073) recruited men from the Olievo-Korolivka area to work as guards (*Wachmann*) at German concentration and forced-labor camps. Mandycz was one such recruit.

On April 7, 1943, Mandycz arrived by train at an SS training camp in Trawniki, Poland, where the Germans assigned him a unique identification number–3308. All guards at Trawniki signed a declaration that they were "subject to the

disciplinary code of 'Police Troops' and not to the jurisdiction of local or German civil courts." JA 911 (expert testimony). All guards "received rifles and live ammunition." JA 912. All guards "received service pay," *id.*, "free food, medical care, shelter and clothing," JA 913. And all guards were eligible for "both an informal type of leave that might last an afternoon or for a single day, or more formally issued leave that would run anywhere from one week to three weeks." JA 2021. The Germans did not treat the guards as part of the German army but as "part of the German police ap[p]aratus." JA 2023.

Adjacent to the training camp was a forced-labor camp "in which the SS and police authorities incarcerated up to 6,000 Jewish prisoners and compelled them to work in war-related industries." JA 886. As part of their training, the Trawniki enrollees guarded the camp.

A German transfer roster, dated May 25, 1943, indicates that the Germans transferred *Wachmann* No. 3308, identified as "Iwan Manditsch," to another Polish labor camp, Poniatowa. JA 985-86. On November 4, 1943, while Mandycz worked as a guard at Poniatowa, the Nazis massacred approximately 14,000 prisoners held at the labor camp. During the massacre, Trawniki-trained guards cordoned off the camp while German SS troops forced Jewish men, women and children to stand in long, wide trenches, where the SS troops shot them with machine guns. The shooting lasted "all day long until the early evening," JA 2105, after which the SS troops burned the victims' bodies.

A second transfer roster indicates that on November 17, 1943, the Germans transferred *Wachmann* No. 3308, identified as "Iwan Manntitsch," from Poniatowa to Trawniki. JA 994-97. A third transfer roster created three

days later indicates that the Germans reassigned *Wachmann* No. 3308, identified as "Iwan Mandytsch," from Trawniki to the "SS Death's Head Guard Battalion, Sachsenhausen." JA 1015-16. It is not clear "whether Guard 3308 actually reached Sachsenhausen," D. Ct. Op. at 14, and his whereabouts from this point until the end of the war remain unclear.

In 1946, the United Nations established the International Refugee Organization to care for "the approximately 1,200,000 remaining World War II refugees in Europe." JA 233; *see Fedorenko v. United States*, 449 U.S. 490, 495 n.5, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981). Consistent with this goal, it assisted "refugees and displaced persons" in returning "to their countries of origin or resettling in different countries." JA 233. Two years later, in 1948, "Congress enacted the Displaced Persons Act . . . to enable European refugees driven from their homelands by the war to emigrate to the United States without regard to traditional immigration quotas." *Fedorenko*, 449 U.S. at 495.

In 1948, Mandycz sought to emigrate from Salzburg, Austria to the United States. To receive an immigrant visa under the Displaced Persons Act, he had to show that he was "the concern" of the International Refugee Organization. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 2(b), 62 Stat. 1009 (defining a displaced person as "any displaced person or refugee . . . who is the concern of the International Refugee Organization"). The Constitution of the International Refugee Organization excluded from this category any person who could "be shown [] to have assisted the enemy in persecuting civil populations." *Fedorenko*, 449 U.S. at 495 n.4. Relying on a questionnaire completed by Mandycz, the International Refugee Organization certified to the Displaced

Persons Commission that Mandycz had not engaged in persecution.

The Commission in turn referred the case to the Army Counterintelligence Corps, which interviewed Mandycz to determine whether he was "admissible into the United States under authority of the [Displaced Persons] Act of 1948." JA 331. Mandycz informed the Corps that from 1943 to 1944 he had worked as a forced laborer for the "Seuring Company" in Vienna. JA 547, 970. He also produced a birth certificate dated July 23, 1920. The investigators did not have access to the records that would have implicated Mandycz as a prison guard because "the three rosters identifying Iwan Mandycz as guard 3308 . . . [were] held behind the Iron Curtain." JA 2389. The Corps also did not receive "cooperation from local authorities or security agencies in countries under Soviet occupation [such as Poland and Ukraine], so it was difficult . . . to verify the background of applicants from these countries." JA 486-87 (report of Mario DeCapua, head of investigations for the Commission after World War II). "In such cases, the [Corps and Commission] were forced to rely more heavily on full disclosure and honesty by the applicants." *Id.* at 487. Relying on Mandycz's representations, the Corps reported to the Commission that the "investigation disclosed no evidence that [the] Subject is or has been a member of, or a participant in, any movement which is or has been hostile to the United States." JA 533.

On December 2, 1949, while still in Austria, Mandycz received his visa. He sailed from Bremerhaven, Germany, later that month, and on December 27, he entered the United States. On May 13, 1955, he applied for naturalization as a United States citizen with the Immigration and Naturalization Service; on June 30, the United States District Court for the Eastern District of Michigan granted his petition for

naturalization. Mandycz settled in Detroit, where he has lived to this day. Beginning in 1950 or so, he began working at Chrysler, first as a janitor and then as an auto worker, and remained employed there until his retirement from the company in 1983.

After the dissolution of the Soviet Union, the United States gained access to archives that implicated a number of post-war immigrants in assisting Nazi Germany. In March 1993, the Office of Special Investigations (OSI), a division of the Department of Justice that "detects and investigates individuals who took part in Nazi-sponsored acts of persecution abroad before and during World War II," OSI website, *available at* http://www.usdoj.gov/criminal/osi.html (last visited May 12, 2006), received materials from post-war Soviet interrogations indicating that an Iwan Mandycz had served as a guard at the Trawniki and Poniatowa camps. On September 17, 1996, after additional information implicated Mandycz in acts of persecution, OSI requested "a voluntary interview" with him to discuss the materials it had gathered. JA 82. Mandycz "declined to be interviewed." *Id.* In March 1997, OSI attempted to confirm Mandycz's birth date with Ukrainian authorities. After a couple of years (and some prodding by OSI), the Procurator General of Ukraine certified in August 1999 that Mandycz was born on January 23, 1920, exactly six months earlier than the birth date he had given during the immigration process.

On April 19, 2000, OSI filed a complaint in the Eastern District of Michigan under 8 U.S.C. § 1451(a) to revoke Mandycz's citizenship, alleging that he had illegally procured it. At some point between 1996 and the filing of the complaint, Mandycz began to suffer from Alzheimer's disease. On January 12, 2001, following an examination by OSI's doctors, the court appointed a guardian under Rule

17(c) of the Federal Rules of Civil Procedure to represent Mandycz throughout the proceedings. After several pretrial proceedings (including a June 2002 appeal that this court dismissed as an impermissible interlocutory appeal, *see United States v. Mandycz*, 351 F.3d 222 (6th Cir. 2003)), the district court held a bench trial from June 14 to June 17, 2004. On February 28, 2005, the court determined that Mandycz had participated in acts of persecution and revoked his citizenship.

II.

"The Constitution authorizes Congress to 'establish a uniform Rule of Naturalization' (Art. I, § 8, cl. 4)," and naturalization remains "a privilege to be given or withheld on such conditions as Congress sees fit." *Schneiderman v. United States*, 320 U.S. 118, 131, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943). In exercising this authority, the National Legislature has provided for the "revocation" of "illegally procured" certificates of naturalization. 8 U.S.C. § 1451. "[A] naturalized citizen's failure to comply with the statutory prerequisites for naturalization renders his certificate of citizenship revocable as 'illegally procured' under 8 U.S.C. § 1451(a)." *Fedorenko*, 449 U.S. at 514. The "statutory prerequisite[] for naturalization" in place at the time of Mandycz's naturalization–"the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1427(a) and 1429"–"required that the individual possess a valid unexpired immigrant visa." *Id.* at 514-15. Whether Mandycz possessed a valid visa turns on the requirements of the Displaced Persons Act. Because it is by now well established that "service as a guard at a Nazi training camp, and subsequent concentration camps, would make him ineligible for a visa under the [Displaced Persons Act]," *United States v. Demjanjuk*, 367 F.3d 623, 630 (6th Cir. 2004), the question comes down to this: Did Iwan

Mandycz serve as a guard at Trawniki and Poniatowa or, put another way, was he Guard 3308? If he was, he agrees that he would not have been eligible for a visa in 1949. And if he was, he agrees that he illegally procured his 1955 naturalization and that it must be revoked today.

In challenging the district court's conclusion that Mandycz and Guard 3308 are one and the same, Mandycz makes one substantive argument and three procedural arguments: (1) the district court erred in finding he was Guard 3308; (2) the Due Process Clause prohibited the government from undertaking this denaturalization proceeding once it learned he was suffering from Alzheimer's disease; (3) laches barred the government from bringing this denaturalization proceeding; and (4) the district court erred in admitting certain evidence. In resolving these disputes, we review the district court's findings of fact for clear error, *id.* at 628, its conclusions of law for error, *id.* at 636, and its evidentiary rulings for abuse of discretion, *id.* at 633.

A.

Mandycz begins by contending that "OSI's evidence did not meet the unusually high burden of proof required in denaturalization proceedings." Mandycz Br. at 14 (capitalization removed). The government, it is true, faces a rigorous burden of proof in this setting. *Schneiderman*, 320 U.S. at 125 ("To set aside such a grant [of citizenship] the evidence must be clear, unequivocal, and convincing–it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.") (internal quotation marks omitted). But in our view, clear, unequivocal and convincing evidence supports the district court's finding that Mandycz was Guard 3308 and that he "'assisted the enemy in persecuting civil populations.'" *Fedorenko*, 449 U.S. at 496

n.4 (quoting the Int'l Refugee Org. Const., Annex I, Part II, 62 Stat. 3051-52).

The government's proof rested on a collection of German guard-transfer rosters, which identified Mandycz as Guard 3308, and evidence corroborating that identification. *First*, the three rosters identify Guard 3308 as having the same first name as Iwan Mandycz and as having a last name that phonetically matches Mandycz's last name. The rosters variously describe Guard 3308 as "Iwan Manditsch," JA 986, "Iwan Manntitsch," JA 997, and "Iwan Mandytsch," JA 1016. Each spelling of the last name, sure enough, does not match "Mandycz" letter for letter, but the differences are fairly explained. As the evidence showed, German clerks processing Eastern European guards repeatedly faced challenges in transliterating unfamiliar names. The name Mandycz was no exception: His last name ends with a sound that is rendered "sh" in English, "cz" in Polish, "ch" in Russian and "sch" in German. JA 880 (expert testimony). A similar problem plagued the clerks in trying to reduce the initial sound of the second syllable of Mandycz's name to letters–with variations from "dy" to "di" to "ti." JA 881 (expert testimony); *see also id.* ("As a result of [] haphazard transliteration decisions and general difficulties with foreign names, the German clerks spelled names inconsistently throughout their records."). Because Guard 3308 had the same first name as Mandycz and the same phonetic last name as Mandycz, the transfer records support the district court's decision. *See generally Grannis v. Ordean*, 234 U.S. 385, 395-96, 34 S. Ct. 779, 58 L. Ed. 1363 (1914) ("But, even in names, 'due process of law' does not require ideal accuracy. In the spelling and pronunciation of proper names there are no generally accepted standards; and the well-established doctrine of *idem sonans* ['the same sound'] . . . is a recognition of this."); *United States v. Emuegbunam*, 268

F.3d 377, 395 (6th Cir. 2001) ("Emuegbunem's argument that the misspelling of his name vitiates the indictment is likewise unavailing. A name need not be correctly spelled in an indictment, if substantially the same sound is preserved.") (internal quotation marks omitted).

Second, in addition to matching Mandycz's first name exactly and his last name phonetically, the rosters identify his acknowledged place of birth and the only ascertainable date of birth for him. The third roster identifies "Iwan Mandytsch, 3308" as being "born on 23 January 1920 in Oliwa Koroliwka, Horodenka." JA 1016. This birthplace matches Mandycz's admitted birthplace and represents the birth date of the only Iwan Mandycz for whom the Ukrainian government has a record of birth in 1920. The parents listed on his Ukrainian birth certificate ("Dmytro Mandych" and "Mariya Skits'ko," JA 1064) match the names admitted by Mandycz to be those of his parents ("Dmytro Mandycz" and "Maria Skidzka," JA 762). And the evidence supported the district court's conclusion that no other Iwan Mandycz was born in Olievo-Korolivka in 1920. Mandycz, it is true, proffered a birth certificate dated "23 July 1920" in connection with his application for an immigration visa. JA 338. But forensic analysis revealed that the date on this birth certificate, exactly six months after the date listed on the Ukrainian-issued certificate and the transfer roster, could not be trusted because the authenticating stamp on the document had been "hand retouched." JA 2441. This evidence led the forensic expert and the district court to determine that the birth certificate should "not be considered an authentic document" when it comes to the July 23 birth date listed there. JA 2452.

Third, the guard-identification numbers further eliminate the possibility that the transfer rosters identify someone other

than the defendant. In each instance, the roster lists Mandycz's name next to the same number–3308. Expert testimony, credited by the district court, showed that these numbers were "specific to the individual guard and were never changed as long as he belonged to the Guard Forces of the SS." JA 882. "Trawniki officials never 're-used' or recycled the identification numbers of discharged men." JA 910. Nor were these numbers "reassigned after a man left the Guard Forces or was killed." JA 882. The repeated correlation of the same name (Mandycz) with the same number (3308), in combination with the biographical information listed on the third roster, provides compelling evidence that there was one and only one Iwan Mandycz who was born in Olievo-Korolivka and who served as Guard 3308.

Fourth, still other evidence corroborates the information contained in the transfer rosters. Statements made by other Trawniki guards during postwar Soviet interrogations identified Mandycz as a guard at Trawniki and Poniatowa and correctly remembered his birth date, birthplace, rank, nationality and itinerary. Trawniki-trained guard Stepan Perig remembered "Ivan Dmitrievich Mandych" and remembered that his "year of birth was 1920," that his "place of birth is in O.-Korolivka," that "[h]e enrolled in the SS police training camp in Travniki in April 1943," that "[h]e underwent special training and guarded prisoners" and that "[h]e guarded prisoners in the camp of Ponyatovo." JA 1082. Ivan Sidorak also remembered "Ivan Dmitrievich Mandych" and remembered that his "year of birth [was] approximately 1920," that "[h]is place of birth is in the village of Olievo Korolivka," that "[h]e is Ukrainian by nationality," that "[h]e was drafted with me to serve in the SS" and that "[h]e served as a *Wachmann* in the SS police training camp in Travniki from April 1943 until October 1943, after which he was sent to the death camp in Ponyatovo." JA 1124.

Perig's and Sidorak's recollection of the middle name "Dmitrievich" further ties Mandycz to Guard 3308. As a patronymic, a name derived from one's father, the middle name of "Dmitrievich" connects Mandycz to his father, whose name (Mandycz concedes) is Dmytro.

Still another individual, Vasilij Gajdich, recalled that "Mandich and I arrived at the 'SS' police training camp at Travniki at the same time," that "[h]e swore an oath and gave a commitment of voluntary service for the German punitive organs," that "[h]e underwent a specialized course of training, after which he served as an 'SS *Wachmann*' and guarded prisoners" and that "[u]pon completing training, he and I were sent to the 'SS' camp in Ponyatovo." JA 1243; *see* 473-74.

Fifth, Mandycz's postwar relationship with Petro Perih, another guard at Trawniki, corroborates the district court's identification finding. During the postwar interrogations, Perig and Sidorak stated that Petro Perih had served at Trawniki. *See* JA 1102-03 (Perig: "[Perih] arrived at the SS training camp in Travniki with me."); JA 1125 (Sidorak: "From April 1943, [Perih] served at the SS police training camp in Travniki. He performed the duties of an SS *Wachmann*."). They also gave similar estimates of Perih's date of birth (1922 or 1923) and remembered that he came from the same hometown (Olievo-Korolivka). Perih's Canadian immigration documents tie him to the Perih remembered by Perig and Sidorak, as they state that he was born in Olievo-Korolivka in 1924. After the war, Perih attended the wedding of Mandycz's daughter. Mandycz's telephone records also reveal that shortly before the government filed the complaint in this case, someone used his telephone to place three calls to Perih's home. Mandycz also listed Petro Perih during discovery in this case as a person

who would have "knowledge or information concerning your whereabouts, employment or activities in Europe between or including 1939 and 1945." JA 792-93. As the district court permissibly found, Mandycz's "post-war contacts with Petro Perih corroborate [Mandycz's] identification with Guard 3308." D. Ct. Op. at 26.

While considerable direct and corroborating evidence links Mandycz to Guard 3308, little evidence supports his contrary account of activities between 1943 and his arrival in this country. In one version of events, recounted in his October 1949 visa application, Mandycz claimed to work for a "Seuring Company" located in Vienna, Austria. JA 547. Yet neither Mandycz nor anyone else has produced any evidence showing that such a company existed. "[R]esearch has not turned up any record that a firm by the name of 'Seuring' or 'Seyring' ever existed in Vienna," JA 974 (expert testimony), and Mandycz stated in his 2001 deposition that he had never worked in Vienna and did not think that he had worked at Seuring.

In another version of events, recounted by Mandycz and confirmed by his daughter based on what Mandycz has told her throughout her life, Mandycz did not work in Vienna, but resided "in a camp in the Linz [Austria] area and was assigned out frequently to different farmers to work as an agricultural laborer." JA 2126. Yet the account of Mandycz as a forced agricultural worker has no documentary support and conflicts with other evidence. *See* JA 976 (noting that no extant account "depicts living in a camp with others and being picked up as needed by local farmers"); JA 977 (noting that "[a]gricultural laborers typically lived on the farms where they worked" because "German labor authorities realized significant cost savings by shifting the costs . . . onto individual farmers"); JA 2126 ("[F]orced laborers who were

forced to reside in camps together were generally deployed at industrial concerns or in rural processing factories."). Austria also created social-insurance records for forced laborers (in the event the laborer destroyed property of the employer), but the Austrian government's "search[] for records verifying that Mandycz served as a forced laborer during World War II . . . produced no evidence that Iwan Mandycz resided as a forced laborer or was employed as a forced laborer in Austria . . . between 1943 and 1945." JA 2124. In the face of considerable evidence that Mandycz was Guard 3308 and in the absence of competing evidence that he was not, we credit the district court's amply supported finding that that is who he was.

Trying to fend off this conclusion, Mandycz points out that the government did not produce evidence that it has produced in similar denaturalization proceedings–namely, a Trawniki personnel file that would have contained Mandycz's photograph and fingerprint as well as other biographical information. Doubtless, the district court (and we) would have preferred the record to contain this highly probative evidence. But just 1,200 out of 5,082 Trawniki guard files survived the war. So the absence of such a file does not prove that one never existed. The question rather is whether the evidence produced clearly and unequivocally showed that Mandycz was Guard 3308. The government's evidence satisfied that burden, and other courts have credited similar forms and amounts of evidence in reaching similar conclusions. *See, e.g.*, *United States v. Szehinskyj*, 277 F.3d 331, 337 (3d Cir. 2002); *United States v. Hajda*, 135 F.3d 439, 444 (7th Cir. 1998); *United States v. Tittjung*, 753 F. Supp. 251, 256 (E.D. Wis. 1990), *aff'd*, 948 F.2d 1292 (7th Cir. 1991).

Mandycz also questions whether the district court should have relied on the Soviet interrogations, noting that they

contain inconsistencies in his physical description. Perig described Mandycz as "tall, full build, blond hair," JA 1103, while Gajdich described him as "tall in height, thin build, elongated face, brown-black hair," JA 1243. The district court held that "[i]n light of the documentary and corroborating evidence, the variance[s] in physical descriptions of Iwan Mandycz provided in the interrogations are factually insignificant and unpersuasive." D. Ct. Op. at 26.

Given the considerable documentary and corroborating evidence connecting Guard 3308's name, birth date, birthplace and parents to Mandycz, these modest discrepancies–occurring in two pieces of corroborative, otherwise consistent evidence and concerning shades of hair color and build–do not undermine the district court's identification finding. The statements were given in 1948, five years after these two individuals served with Mandycz over the course of a seven-month period from April 1943 to November 1943. "[P]hysical descriptions," as the record confirmed, "are often relative and often depend on the self-perception of the individual who is describing the person in question." JA 1996. And even if the two men accurately recollected and assessed these physical features, no evidence shows that the two men perceived Mandycz at the same time. Summer of course may give brown hair a blond appearance, and it would hardly be unusual for guard service during a war to convert a full build into a thin one in a matter of months. In the end, these alleged discrepancies do not undermine the district court's finding-as other courts have found in similar circumstances. *See, e.g.*, *Hajda*, 135 F.3d at 444 ("[T]here are many explanations for the difference [in height] . . . and, in any event, the perfect matches in the other categories more than made up for this rather minor difference. The discrepancy in hair color is in the same boat–a minor

variance."); *see also, e.g.*, *Neal v. Acevedo*, 114 F.3d 803, 807 (8th Cir. 1997) ("The minor discrepancies in the victim's descriptions of Neal were brought before the jury by defense counsel. The jury could have rationally discounted these discrepancies in light of the victim's positive identification of Neal at trial, the other circumstantial evidence connecting Neal to the crime, and the problems with Neal's alibi defense.").

Mandycz, more generally, contends that the district court should not have credited the Soviet interrogation records, noting that in 1995 (in the district court's words) "three men told Canadian authorities that Soviet investigators coerced or falsified confessions from them in the 1940's." D. Ct. Op. at 27. But in choosing not to credit these recantations, the district court observed that the three statements "contradict reliable historical evidence indicating that each [individual] participated in Nazi service" and that the three individuals made the statements to "avoid[] implicating themselves in atrocities and other bad acts." *Id.* at 27. Under these circumstances, the district court did not abuse its discretion in declining categorically to reject the use of any and all Soviet interrogation records. *See, e.g.*, *United States v. Kungys*, 793 F.2d 516, 520 n.2 (3d Cir. 1986) ("[W]e reject the suggestion that all depositions taken in the Soviet Union should be automatically excluded from evidence."), *rev'd on other grounds*, 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988).

Nor, more specifically, has Mandycz shown that the interrogation records used in this instance were of dubious value. The three cited individuals have no connection to Mandycz, and the transfer records corroborate the interrogation records that the district court considered. On this

record, we cannot say that the district court committed reversible error in considering these records.

B.

Mandycz next argues that the government violated his due process rights by bringing this denaturalization proceeding against him while he was mentally incompetent. The incompetence of any party to a denaturalization suit, he argues, operates as an absolute bar to the action, and even if that is not the case, the circumstances of his incompetency should have required the district court to halt this proceeding. We disagree.

In September 2000, OSI's doctors examined Mandycz and determined that Alzheimer's had taken a sufficient toll on him such that he was no longer of sound mind. Had the district court found that Mandycz was incompetent based on these examinations, that finding would have precluded the government from proceeding against him in a criminal proceeding. As the Supreme Court has "repeatedly and consistently recognized," the criminal prosecution "of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) (internal quotation marks omitted). A criminal defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as a factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *see also Cooper*, 517 U.S. at 368 ("The test for competence to stand trial . . . is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel.").

The problem is that "[a] denaturalization suit is not a criminal proceeding," *Schneiderman*, 320 U.S. at 160; it is a "civil case," *Addington v. Texas*, 441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *see United States v. Joudis*, 800 F.2d 159, 162 (7th Cir. 1986) ("Denaturalization and deportation are civil proceedings."). Criminal cases offer many due process protections–*e.g.*, jury trial, indictment, beyond-a-reasonable-doubt burden of proof, right to counsel–that civil proceedings, including denaturalization proceedings, do not. *See, e.g.*, *United States v. Schellong*, 717 F.2d 329, 336 (7th Cir. 1983); *United States v. Koreh*, 144 F.R.D. 218, 220 (D.N.J. 1992); *see also INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984); *Nelson v. INS*, 232 F.3d 258, 261 (1st Cir. 2000).

All of this remains true even when the case involves an incompetent party. *See Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 767 (7th Cir. 2004); *Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977); *United States v. Weinstein*, 511 F.2d 622, 628 (2d Cir. 1975); *see also Mohamed v. TeBrake*, 371 F. Supp. 2d 1043, 1046 (D. Minn. 2005); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 695 F. Supp. 1426, 1432 (E.D.N.Y. 1988).

So while the commencement of a civil case does not suspend the Due Process Clause, it does alter the fairness requirements of the Clause. Whereas due process protects incompetent criminal defendants by imposing an outright prohibition on trial, it protects incompetent civil parties by requiring the court to appoint guardians to protect their interests and by judicially ensuring that the guardians protect those interests. *See* Fed. R. Civ. P. 17(c) ("The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the

infant or incompetent person."); *see also Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 203 (2d Cir. 2003) ("[T]he district judge should be aware that due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem."); *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1309 (11th Cir. 2001), *vacated on other grounds*, 537 U.S. 1085, 123 S. Ct. 718, 154 L. Ed. 2d 629 (2002); *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652 (2d Cir. 1999); *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989); *Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281, 285 (4th Cir. 1979). Independent of the court's duty to appoint a guardian to look after his interests, Mandycz of course also is entitled to the other basic protections of due process in a civil setting. *See United States v. Kairys*, 782 F.2d 1374, 1384 (7th Cir. 1986) ("[B]ecause denaturalization is civil and equitable in nature, due process [is] satisfied by a fair trial before an impartial decisionmaker.").

In Mandycz's earlier appeal in this case, our court suggested a similar resolution of this issue. Soon after OSI's doctors determined that he was incompetent, Mandycz filed an interlocutory appeal seeking to halt the denaturalization proceeding because it was sufficiently akin to a criminal proceeding. In denying leave to appeal, the court noted that "[d]enaturalization proceedings are technically considered suits in equity, not criminal actions." *United States v. Mandycz*, 351 F.3d 222, 225 n.1 (6th Cir. 2003). "In civil cases," it added, "the competency of a defendant is not irrelevant, of course. Incompetent and infant civil defendants are entitled to the appointment of a guardian ad litem. However, a civil defendant's mental incompetence does not trigger an abatement of trial as it does in the criminal context." *Id.* (citations omitted). Whether these earlier statements were necessary to the resolution of the earlier

appeal and therefore bind us as part of the law of the case, *see Moss v. United States*, 323 F.3d 445, 458 (6th Cir. 2003), or represent footnoted dicta unnecessary to the court's determination that it lacked jurisdiction over Mandycz's interlocutory appeal need not detain us. The salient point is that we independently reach the same conclusion today.

Perhaps appreciating this entrenched distinction between the civil and criminal due process protections for incompetent individuals, Mandycz has filed a supplemental brief indicating that he "is not arguing for due process protection for all 'civil' defendants" but only for protection for denaturalization defendants facing his unique circumstances. Mandycz Supp. Br. at 13; *see id.* ("Recognition of such a due process right is only reasonable in light of the extraordinarily unique posture of this case."). While we need not decide today whether there could be a denaturalization proceeding in which due process requires more protection than this civil defendant received, Mandycz has not convinced us that his circumstances warrant an exception to the rule. In one sense, the district court exceeded the requirements of due process as it appointed a guardian for Mandycz without making a finding that he was incompetent; the court apparently determined that the examination results of OSI's doctors sufficed to make the appointment of a guardian appropriate. Nor has anyone alleged that the guardian failed to look after Mandycz's interests or that Mandycz otherwise failed to receive "a fair trial before an impartial decisionmaker." *Kairys*, 782 F.2d at 1384; *see* Mandycz Supp. Br. at 15 (conceding that the denial of other criminal procedure protections—e.g., jury trial–in denaturalization cases was appropriate because of "the assurance that one will still receive a fair trial").

In another sense, the district court was presented with a party who, despite his illness, was able to offer considerable

assistance to his defense, a feature of this case that will not invariably be replicated in other civil proceedings involving incompetent parties. Keep in mind that the government first notified Mandycz of its investigation in 1996 when it asked to interview him about whether he had been a guard at Nazi labor and concentration camps. And the government filed this complaint in 2000. Mandycz first complained about memory loss in 2000, and no one contends that he was unable to assist his defense in 1996 when he first learned about this inquiry. Indeed, the district court found that Mandycz exhibited "lucidity at his deposition" in May 2001, D. Ct. Op. at 34, as he "recounted that he was taken from his home to work on a farm in Linz during World War II," a story that was "the same one [he] told his adult daughter throughout her life" and to which she was permitted to testify, *id.* at 33. He told this story in considerable detail, giving his attorneys ample opportunity to verify his claims and substantiate them with evidence–whether from immigration records, from his family or from acquaintances.

Mandycz, notably, has not challenged the district court's finding that he exhibited "lucidity" at his deposition or the court's finding that his daughter's independent recollections corroborated his version of events. *Compare* JA 1510-11, 1518, 1631 (Mandycz) (agreeing that "in 1943 the Germans were recruiting young men in [Olievo-Korolivka]," and remembering that he was taken "[t]o Austria to work," "to Linz in Austria," and that after the war ended, he went "[t]o Salzburg") *with* Donna Christina Depo. at 132-33 (daughter) ("He said Linz" was where he stayed; "I know he was at home, Olijewa Korliwka, and then he was in Linz. Then he went to Salzburg . . . . I think it was '43 and then '45 the war was over."); *compare also* JA 1519 (Mandycz) ("Trucks came and they were taking us somewhere to camps and we were told you're going to live here. And from here you will

be taken to farms.") *with* Christina Depo. at 50-51 (daughter) ("[H]e worked on the farm during the summer" and stayed in "some kind of area where the workers lived . . . ."). Even if we were to acknowledge the possibility of granting an exception to the traditional civil rules for denaturalization proceedings, Mandycz has not shown that this is an appropriate case for doing so.

Mandycz, finally, points out that "an incompetent person may not, as a matter of law, voluntarily renounce his or her citizenship." Mandycz Br. at 27. That may be true but it does not help his claim. Under 8 U.S.C. § 1481(a)(5), "[a] person who is a national of the United States . . . shall lose his nationality by voluntarily . . . making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state." The statute thus requires renunciation to "be by voluntary act," *Perri v. Dulles*, 206 F.2d 586, 589 (3d Cir. 1953), and the law generally places restrictions on the ability of incompetent individuals to accomplish voluntary and legally binding acts, *see McGrath v. Tadayasu Abo*, 186 F.2d 766, 772 (9th Cir. 1951); *see also Spytma v. Howes*, 313 F.3d 363, 370 (6th Cir. 2002). But all of this means only that Mandycz could not voluntarily relinquish his citizenship, not that the government lacks authority to commence an *involuntary* denaturalization proceeding against him under 8 U.S.C. § 1451.

C.

Mandycz next argues that laches barred the government from bringing this denaturalization claim given the lapse of time between the government's first discovery of evidence that Mandycz was a prison guard and the filing of this complaint. We disagree.

Because the United States acted in its sovereign capacity when it sought to denaturalize Mandycz, the common law doctrine of laches does not apply. "It is well settled that the United States is not . . . subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283, 1940-2 C.B. 435 (1940). "The ancient rule *quod nullum tempus occurit regi*–'that the sovereign is exempt from the consequences of its laches . . .'–has enjoyed continuing vitality for centuries." *United States v. Peoples Household Furnishings, Inc.*, 75 F.3d 252, 254 (6th Cir. 1996); *see also Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir. 2003) ("It is well established that the Government generally is exempt from the consequences of its laches."); *United States v. Weintraub*, 613 F.2d 612, 618 (6th Cir. 1979).

Whatever the scope of the exception to this rule–triggered when the government stands in the shoes of a private party, as opposed to when it acts in its sovereign capacity, *see Hatchett*, 330 F.3d at 887; *cf. United States v. California*, 507 U.S. 746, 757, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993)–it does not apply here. When the United States acts to grant or take away the right of citizenship, it quintessentially acts in its sovereign capacity, *see Haile v. Gonzales*, 421 F.3d 493, 494 (7th Cir. 2005), *Faddoul v. INS*, 37 F.3d 185, 189 (5th Cir. 1994), a legal reality confirmed by the incapacity of private parties to remove a fellow American's citizenship or grant it in the first instance.

Costello v. United States, 365 U.S. 265, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961), does not hold otherwise. Noting that it "has consistently adhered to [the] principle" "that laches is not a defense against the sovereign," *id.* at 281, the Court commented that it had not "considered the question of the application of laches in a denaturalization proceeding," *id.* at

282. But "even if we assume the applicability of laches," the Court then held "that the petitioner failed to prove both of the elements which are necessary to the recognition of the defense." *Id.* Invoking this language, Mandycz says that "*Costello* appeared to recognize the possibility laches could be raised as a defense to denaturalization." Mandycz Br. at 49.

But circuit precedent forecloses Mandycz from threading this needle. In *United States v. Weintraub*, 613 F.2d 612, 618 (6th Cir. 1979), we read *Costello* to "admit[] to no exceptions to the rule that laches cannot defeat the government." The "primary holding" of *Costello*, we have already decided, is that "laches was inapplicable." *Id.* at 619; *see also id.* at 619-20 ("The rule is of such long standing that we do not believe the Supreme Court would carve out an exception to it without expressly saying so."); *United States v. Arrow Transp. Co.*, 658 F.2d 392, 395 (5th Cir. 1981) ("*Costello* by no means holds that laches is applicable against the United States.").

But even if we were to consider the defense, it would not aid Mandycz. The laches defense has "two elements: (1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party." *Brown-Graves Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000). Any "delay" in initiating this case was not unreasonable. Quite understandably, Mandycz does not contend that the government unduly delayed this proceeding during the years between 1949, when Mandycz first entered the country, and 1993, when the government first learned that he might have been a Nazi guard. While Mandycz does challenge the government's decision to wait until 2000 to file this complaint, there were legitimate reasons for that delay. The government acquired the first piece of the puzzle in 1993, when it learned of statements from Gajdich's

post-war Soviet trial placing Mandycz at Poniatowa. Fairly choosing not to commence a proceeding on this basis alone, the government "suspended" further investigation "unless and until further personal details . . . came to light." JA 81. More information surfaced in 1994, this time identifying an Iwan Mandycz with a 1920 birth date and a birthplace in Olievo-Korolivka. In 1995, the government received a transfer roster, again with a birth date and birthplace. An impediment remained, however, because the birth dates on these documents (January 23, 1920) did not match the birth date on file for Mandycz (July 23, 1920). To resolve this disparity and others (the existence for example of the Seuring Company), the government requested an interview with Mandycz. When Mandycz, through counsel, refused to be interviewed, that forced the government to confirm independently which of the two birth dates was accurate–which could be done only with the assistance of the then-recently-independent Ukrainian government. This process consumed over two years and required considerable effort. *See, e.g.*, JA 101 (May 20, 1998 letter from OSI to Ukrainian procurator: "[Y]our office indicated that it believed it had responded to all of the requests for assistance that we had submitted since March 1997. In fact, we have received almost none of the materials that Mr. Kyrylenko indicates were forwarded to us."). Having reasonably waited until it could confirm that Mandycz was Guard 3308 and having been unable to obtain Mandycz's cooperation in resolving ambiguities in the record, the government cannot be said to have unreasonably delayed the commencement of this action.

D.

Mandycz, lastly, challenges the authenticity of the Soviet interrogation records and their admissibility under the ancient-documents exception to the hearsay rule. Under that

exception, courts may admit into evidence "[s]tatements in a document in existence twenty years or more the authenticity of which is established." Fed. R. Evid. 803(16). Authenticity in turn is a function of whether the document "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered." Fed. R. Evid. 901(b)(8).

Though conceding that the Soviet interrogation records are at least 20 years old, Mandycz claims that this hearsay exception does not apply because the documents are not "authentic." In support of this argument, he marshals a variety of sources to make the point that the Soviet Union did not value truth–*e.g.*, "To speak the truth is a petty bourgeois prejudice. To lie, on the other hand, is often justified by its ends," Vladimir Lenin *in* Chapman Pincher, *The Secret Offensive* 24 (1985)–then reasons that all documents of the old regime "lack trustworthiness." Mandycz Br. at 35. Putting to one side the sweeping breadth of his argument, it suffers from a more basic problem. "Although Rule 901(b)(8) requires that the document be free of suspicion, that suspicion goes not to the content of the document, but rather to whether the document is what it purports to be." *Demjanjuk*, 367 F.3d at 631. "Whether the contents of the document correctly identify the defendant goes to its weight and is a matter for the trier of fact; it is not relevant to the threshold determination of its admissibility." *Kairys*, 782 F.2d at 1379; *see also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 661 (6th Cir. 2000) (citing *Kairys* and noting that "[q]uestions as to the documents' content and completeness bear upon the weight to be accorded the evidence and do not affect the threshold question of authenticity"). The authenticity inquiry, then, turns on "whether the document is what it purports to be," not its veracity. *Demjanjuk*, 367 F.3d at 631. Because

Mandycz does not argue, much less prove, that the Soviet interrogation records are not what they purport to be–Soviet interrogation records–his contention fails. *See, e.g.*, *Hajda*, 135 F.3d at 442-45 (admitting statements given to communist interrogators); *Kalejs*, 10 F.3d 441at 447 (same); *United States v. Stelmokas*, 100 F.3d 302, 312 (3d Cir. 1996) (admitting documents that came from Soviet sources or were in Soviet possession); *United States v. Linnas*, 527 F. Supp. 426, 433-34 (E.D.N.Y. 1981) (admitting depositions videotaped by Soviets), *aff'd*, 685 F.2d 427 (2d Cir. 1982).

* * * * *

While Iwan Mandycz has only the prospect of review in the Supreme Court before this denaturalization proceeding comes to an end, that does not mean he has reached the end of the road when it comes to deportation. A denaturalization finding permits the Attorney General to seek deportation; it does not require him to do so. The government concedes as much, *see* Gov't Supp. Br. at 1 ("[T]he Government *does* have prosecutorial discretion" "to refrain from removing incompetent persons . . . ."), and acknowledges that it has exercised such discretion before. *See also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999); *Carranza v. INS*, 277 F.3d 65, 72 (1st Cir. 2002). Whether the stamp now placed on Mandycz of having aided Nazi Germany in the persecution and killing of thousands of Jews suffices to vindicate the policies underlying the Displaced Persons Act of 1948 and the Immigration and Nationality Act of 1952 or whether the deportation of this incompetent 86 year old is required as well we leave to the discretion delegated by Congress to the Attorney General. For present purposes, the district court fairly and permissibly concluded that Mandycz was Guard

3308 and accordingly should never have been granted the benefits of United States citizenship.

III.

For these reasons, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 00-40148

[Filed February 28, 2005]

UNITED STATES OF AMERICA,

Plaintiff,

v.

IWAN MANDYCZ,

Defendant.

JUDGMENT

This action having come before this Court, the Honorable Paul V. Gadola presiding, the issues having been fully presented, the Court being fully advised in the premises, and a ruling having been duly rendered, **IT IS ORDERED AND ADJUDGED** that the United States citizenship of Defendant Iwan Mandycz is **REVOKED** in accordance with the opinion and order of this same date.

Dated at Flint, Michigan, this 28th day of February, 2005.

DAVID WEAVER
CLERK OF THE COURT

By: s/Julia L. Dellinq
DEPUTY CLERK

APPROVED:

s/Paul V. Gadola
HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 00-40148

[Filed February 28, 2005]

UNITED STATES OF AMERICA,

Plaintiff,

v.

IWAN MANDYCZ,

Defendant.

JUDGES: HONORABLE PAUL V. GADOLA, U.S. DISTRICT JUDGE.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

On June 14, 2004 to June 18, 2004, the Court conducted a bench trial in this case. The parties each submitted post-trial briefs and proposed findings of fact and conclusions of law in July 2004. The Court now issues its findings of fact and

conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure. These findings of fact and conclusions of law represent the Court's consideration of all of the admissible evidence in light of the pertinent law, the Court's observation of the witnesses, and its evaluation of their demeanor, qualifications, and credibility. *See Seal-Flex, Inc. v. W.R. Dougherty & Assocs., Inc.*, 254 F. Supp. 2d 647, 649 (E.D. Mich. 2003) (Gadola, J.). The citations after each proposition support the finding. The Court notes that the voluminous exhibits in this case corroborate the Court's findings in numerous respects. Consequently, the citations chosen should not be considered the sole supporting material, but are rather exemplary of the evidence available.

Every finding of fact that may be construed to incorporate a conclusion of law is adopted as a conclusion of law. *See id.* Every conclusion of law that may be construed to incorporate a finding of fact is adopted as a finding of fact. *See id.* The subheadings used are for convenience only. *See id.* If a finding of fact or conclusion of law is pertinent to any determination other than that indicated by the heading under which it appears, it is adopted as a finding of fact or conclusion of law applicable to such other determination or determinations as may be appropriate. *See id.*

II. FINDINGS OF FACT

A. Background and the Service of Guard 3308

1. At the outset, the Court finds the testimony and credentials of expert historian Dr. Peter Black to be credible.

2. The *Schutzstaffel* ("SS") was the elite guard and intelligence unit of the Nazi Party of Germany. (Tr. 6-14[1], at 119-21).

3. Trawniki Training Camp was a facility established and operated by the SS and the German police. (Tr. 6-14, at 130-35).

4. Trawniki Training Camp was located outside the village of Trawniki in the Lublin District of the Government General. (GX 36; GX 71; Tr. 6-14, at 122, 130).

5. Men who trained at the Trawniki Training Camp became members of the Guard Forces (*Wachmannschaften*) of the SS and Police Leader in Lublin District. (Tr. 6-14, at 130, 191; GX 25 at 41).

6. At Trawniki, the term *Wachmann* was a rank meaning "guard private." The German word "Wachmann" translates literally to the English word "guard." (Tr. 6-14, at 138).

7. Training at Trawniki Training Camp lasted approximately six to eight weeks. It consisted of military drills, weapons instruction, guard training, and instruction on German commands. The Trawniki men were trained for police duty, guard duty, and prison transport escort work. (GX 34 at 4; GX 79 at 6; GX 84 at 4; GX 85 at 2; Tr. 6-14, at 152-53).

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[1] The Trial Transcripts are referenced by month and day. Government exhibits are referred to as "GX," and defense exhibits as "DX."

8. "Operation Reinhard" was the Nazi campaign to exploit and exterminate Jews in Poland. (Tr. 6-14, at 129-34).

9. Under Operation Reinhard, an estimated 1.7 million Polish Jews were killed, Jewish labor was exploited in labor camps under armed guard, and Jewish property and personal belongings were stolen and distributed to benefit the German economy. (GX 37; GX 73; Tr. 6-14, 123, 129-34).

10. The Guard Forces and its Trawniki-trained guards participated in and were essential to the implementation of Operation Reinhard. (Tr. 6-14, at 132-34).

11. In 1942, the Germans had established a forced labor camp for Jews adjacent to the Trawniki Training Camp. This forced labor camp was known as the "Trawniki Labor Camp." (GX 71; Tr. 6-14, at 153-54).

12. Trawniki Labor Camp was an Operation Reinhard forced labor camp. (GX 73).

13. The number of prisoners at the Trawniki Labor Camp increased significantly in the spring of 1943, as the Warsaw ghetto was liquidated in April 1943 and its inhabitants were sent to Trawniki, among other locations. (Tr. 6-14, at 153-54).

14. As part of Operation Reinhard, the Nazis pressured Fritz Emil Schultz, one of the two largest employers in the Warsaw ghetto, to relocate his fur-production and brush-making plants to Trawniki. To staff those

factories, the SS deported a total of 5,656 Jews (2,949 men, 2,323 women, and 384 children) from the Warsaw ghetto to the Trawniki Labor Camp. (GX 25 at 48-49; Tr. 6-14, at 153-62).

15. The prisoners at Trawniki Labor Camp performed forced labor, lived in difficult conditions and under a justified fear of death. (GX 25 at 48-49; GX 78 at 3; GX 80 at 3; GX 81 at 10; Tr. 6-14, at 153-62).

16. From the time its first Jewish prisoners arrived in summer 1942 until November 1943, the Trawniki Labor Camp was guarded by Trawniki-trained guards, who prevented the prisoners from escaping. (Tr. 6-14, at 153, 163).

17. At no time during the existence of the Trawniki Labor Camp did trainees at the training camp perform only non-guarding functions; all men either guarded the labor camp when needed, or were involved in supervising others who guarded. (Tr. 6-15 (afternoon), at 62).

18. As a matter of standard procedure, all *Wachmanner* who arrived at Trawniki Training Camp, including those in April 1943, received practical, hands-on training by guarding the Trawniki Labor Camp and prevented the prisoners from escaping during their period of training. (GX 32 at 3; GX 79 at 4-5; GX 80 at 2; GX 84 at 4-5; GX 85 at 3-4; Tr. 6-14, 153-54, 163-69).

19. The trainees performed this guard duty while armed with rifles. (GX 80 at 3; Tr. 6-14, at 163).

20. Trawniki men were eligible for promotions, paid, granted leave, and received other benefits. (Tr. 6-14, at 138-39, 191).

21. Clerks at Trawniki and Operation Reinhard camps created many contemporaneous documents concerning Trawniki personnel, including transfer rosters and personnel files, which were retained in the ordinary course of the enterprise. (Tr. 6-14, at 140-43, 171-72).

22. Clerks at Trawniki prepared personnel files that contained the biographical information of each new recruit, using interpreters, if necessary, to complete the forms with information that the recruits provided. (Tr. 6-15 (morning), at 96-97; Tr. 6-17 (morning), at 14-15).

23. The recruits ordinarily signed the personnel forms and affixed their thumb print. (Tr. 6-14, at 141; *e.g.*, GX 39-57).

24. All newly arrived recruits at Trawniki received permanent personnel identification numbers. (Tr. 6-14, at 137).

25. A Trawniki guard's personnel identification number was unique, and remained with him throughout his service. A number was not reassigned, even if the recipient died, deserted, or otherwise left service. (Tr. 6-14, at 136-37).

26. Upon his arrival at Trawniki, a personnel file was created for Guard 3308. (Tr. 6-14, at 144).

27. Approximately 1,200 of the 5,082 personnel files that were created survived the war. (Tr. 6-17 (morning), at 16).

28. The personnel file for Guard 3308 was not among the personnel files that survived the war. (Tr. 6-14, at 144).

29. Guard 3308 arrived at Trawniki Training Camp on or about April 7, 1943. (Tr. 6-14, at 145-46). Guard 3308's arrival date is established by his identification number, which falls within a block of numbers known to have been assigned on or about April 7, 1943, as corroborated by (1) all extant Trawniki personnel files with numbers between 3301 and 3399; (2) the listing of Guard 3308 on a subsequent transfer roster, which is consistent with the completion of the standard period of training; and (3) the postwar recollections of other Trawniki men with numbers between 3301 and 3400, who stated that they arrived in April 1943. (GX 32-34, 58, 60; Tr. 6-14, at 145-52).

30. Guard 3308 was inducted into the Guard Forces [*Wachmannschaften*] of the SS and Police Leader in Lublin District. He was assigned the rank of *Wachmann* (guard private). (GX 26 at entry 8; GX 27 at entry 71; GX 28 at entry 10; Tr. 6-14, at 137-38).

31. After his arrival at Trawniki, Guard 3308 underwent the standard training regimen at Trawniki, which included military drills, weapons training, learning German commands, and learning how to arrest, guard, and escort prisoners. (Tr. 6-14, at 152-53).

32. During his training, Guard 3308 guarded prisoners at the Trawniki Labor Camp, while armed with a rifle. (Tr. 6-14, at 170-71; Tr. 6-15 (morning), at 54).

33. On or about May 25, 1943, a contingent of guards was transferred from the Trawniki Training Camp to the Poniatowa Labor Camp. (GX 26; Tr. 6-14, at 175, 196-99).

34. The Poniatowa Labor Camp was a Jewish forced labor camp established in Poniatowa, Poland in fall 1942, and remained in operation until November 1943, and was a part of Operation Reinhard. (GX 25 at 55; GX 73; Tr. 6-14, at 173-75).

35. Government Exhibit 26 is a roster dated May 25, 1943, documenting the transfer of men from the Trawniki Training Camp to serve as guards of the Poniatowa Labor Camp. (GX 26).

36. Guard 3308 was among the contingent transferred from Trawniki to Poniatowa on May 25, 1943, and he appears on the May 25, 1943 roster at entry eight, as "Iwan Manditsch" with the rank of *Wachmann*. (GX 26).

37. The roster reflecting this transfer, as well the two other rosters addressed subsequently, were created by German wartime agencies to document the movement of Trawniki-trained guards. They were created by a clerk with knowledge of the personnel being transferred, at or near the time of the transfers. The rosters were made and retained in the regular course of Trawniki's enterprise. (GX 26-28; Tr. 6-14, at 171-72, 187).

38. The May 25 roster was signed by an Order Police Official named Heinze. Independent historical evidence corroborates that Heinze served at Trawniki at the time he signed the May 25 roster. (Tr. 6-14, at 172-73).

39. Independent historical evidence, summarized on GX 94, corroborates that the men listed on the May 25 roster arrived at Poniatowa and served there. (GX 27, 32-34, 39-57, 60, 94, 95, 105, 109; Tr. 6-14, at 181-86).

40. After spring 1943, Poniatowa primarily exploited the labor of Jews deported from the Warsaw ghetto. Between February and July 1943, between 11,000 and 15,000 Jews arrived at Poniatowa from Warsaw and other locations. (Tr. 6-14, at 173-75).

41. Most of these prisoners produced clothing for the Tobbens company, which, like Schultz, had relocated from the Warsaw ghetto. (GX 90; Tr. 6-14, at 173-75).

42. Other prisoners worked outside the factory grounds, laboring on such projects as constructing barracks and roads, digging ditches, clearing trees, and working in a stone quarry. (GX 25 at 55-57, 72-73; GX 91 at 3; Tr. 6-14, at 178-80).

43. While a small number of Jews lived a few hundred yards away from the main camp in a row of housing blocks known as the "Settlement," most of the prisoners lived at the factory site. (GX 25 at 55-57; GX 87; GX 88; Tr. 6-14, at 175-76, 179-80).

44. By June 1943, a new camp command was installed at Poniatowa, and conditions became harsher for the prisoners. (Tr. 6-14, at 175-76).

45. Prisoners had little food and were beaten or killed by guards for minor transgressions. (GX 91 at 4; GX 101 at 2; Tr. 6-14, at 179-80).

46. Trawniki-trained men served as guards at the Poniatowa Labor Camp and prevented the prisoners from escaping. (GX 79 at 7; GX 97 at 3; GX 99 at 2; GX 100 at 2; GX 113 at 2; Tr. 6-14, at 175, 180, 196-200; Tr. 6-15 (morning), at 8-17).

47. These guards were assigned in a rotation that included: manning watchtowers around the camp, patrolling between two parallel, barbed-wire fences that surrounded the labor camp, guarding the "Settlement," performing sentry duty at the camp entrances, and escorting to work those prisoners not employed in the Tobbens factory and guarding them at the work sites. (GX 25 at 70-71; 79 at 7; Tr. 6-14, at 199-200).

48. If a Trawniki-trained guard at Poniatowa were found to be physically unable or unsuitable to perform guard duty, he was discharged and released from service. (GX 102 at 3-5; Tr. 6-15 (morning), at 15).

49. From approximately May 25, 1943 to approximately November 17, 1943, Guard 3308 served as an armed guard at the Poniatowa Labor Camp, preventing prisoners from escaping and compelling them to perform forced labor. (Tr. 6-14, at 194; Tr. 6-15 (morning), at 19, 28, 54-55).

50. In November 1943, the Germans completed Operation Reinhard with a massacre of thousands of Jewish forced laborers at various locations in the Government General, conducted under the code name "Operation Harvest Festival" (*Erntefest*). (Tr. 6-15 (morning), at 20-21).

51. On November 3, 1943, SS and police forces shot the approximately 6,000 prisoners at the Trawniki Labor Camp, whom Guard 3308 had guarded six months earlier. (Tr. 6-14, at 157; Tr. 6-15 (morning), at 20-21, 22-25).

52. On the night of November 3, 1943, SS and police forces surrounded the camp at Poniatowa. The next day, these men ordered the Jewish prisoners to undress, marched them to open pits, and killed the approximately 12,000-16,000 Jewish inmates then alive at Poniatowa. (GX 101 at 2; GX 106 at 19-20; GX 108 at 5-8; Tr. 6-15 (morning), at 21).

53. Some prisoners who resisted at Poniatowa were burned alive in their barracks. (GX 111 at 4-5; Tr. 6-15 (morning), at 21).

54. In all, approximately 40,000 to 42,000 prisoners were killed during Operation Harvest Festival, which was the largest single shooting execution of the entire Final Solution. (Tr. 6-15 (morning), at 21-23).

55. The Trawniki-trained guard contingent posted at Poniatowa did not themselves take part in shooting prisoners, but assisted the operation in a variety of ways, including performing their normal guard duty around the perimeter of the camp. Participants and

Polish witnesses also variously recalled that the Trawniki-trained guards stood in a cordon and escorted Jews from the Settlement to the main camp to join the other prisoners, among other tasks. (GX 25 at 79-81; GX 105 at 4-7; GX 112 at 1; Tr. 6-15 (morning), at 21, 26).

56. The bodies were subsequently burned on make-shift outdoor pyres. (GX 105 at 6; GX 108 at 8-9; Tr. 6-15 (morning), at 27; GX 101 at 2; GX 113 at 2).

57. Although there is no evidence that Guard 3308 was on duty during Harvest Festival, he guarded the Jewish prisoners for six months until they were killed on November 4, 1943, and remained assigned to the camp as the bodies were burned. (Tr. 6-15 (morning), at 27-28).

58. Following the massacre of most of the prisoners at Poniatowa, the need for guards was greatly reduced. On November 17, 1943, the majority of the Trawniki guard contingent was transferred back to Trawniki. (GX 27; Tr. 6-14, at 184-88, 192; Tr. 6-15 (morning), at 28).

59. Government Exhibit 27 is a roster dated November 17, 1943, documenting the transfer of men back to Trawniki from Poniatowa. (GX 27; Tr. 6-14, at 186).

60. Guard 3308 was among this contingent, and he appears on a roster dated November 17, 1943, at number 71, as "Iwan Manntitsch," with the rank of *Wachmann*. (GX 27).

61. By the time that Guard 3308 was transferred back to Trawniki on November 17, the administrative jurisdiction for Trawniki and the Trawniki men had been shifted from the SS and Police Leader to the SS Economic and Administrative Main Office (WVHA). (Tr. 6-15 (morning), at 29).

62. As a result of the administrative transfer, many Trawniki-trained guards left the Trawniki system and were assigned to SS Death's Head battalions at the WVHA concentration camps, including the Sachsenhausen Concentration Camp, located near the town of Oranienburg, northeast of Berlin. Sachsenhausen served as a transit point for Trawniki-trained guards being deployed throughout the concentration camp system. (Tr. 6-15 (morning), at 29-30).

63. On November 20, 1943, a contingent of Trawniki guards was assigned to be transferred to the SS Death's Head Guard Battalion Sachsenhausen. (GX 28; Tr. 6-14, at 88).

64. Government Exhibit 28 is a roster dated November 20, 1943, documenting the transfer of men from Trawniki to the Sachsenhausen Concentration Camp in Germany. (GX 28; Tr. 6- 14, at 88-89).

65. Guard 3308 was among this contingent, and he appears on the roster dated November 20, 1943 at entry number 10, as "Iwan Mandytsch," the rank of *Wachmann*, a birth date of January 23, 1920, and a birth place of Olievo-Korolivka, Horodenko Rayon. (GX 28).

66. Although reliable corroborative evidence demonstrates that Guard 3308 and the other men on the November 20 roster were sent from Trawniki to Sachsenhausen, the evidence is inconclusive as to whether Guard 3308 actually reached Sachsenhausen. (Tr. 6-15 (morning), at 32-36; Tr. 6-15 (afternoon), at 64).

67. Guard 3308's transfer out of Trawniki to Sachsenhausen severed his ties to the Guard Forces of the SS and Police Leader in Lublin. (Tr. 6-15 (morning), at 34).

68. Guard 3308 was, therefore, a member of the Guard Forces of the SS and Police Leader in Lublin from approximately April 7, 1943, until November 20, 1943. (Tr. 6-15 (morning), at 54).

69. Because the May 25, November 17, and November 20 rosters all list a guard with the same unique identification number "3308," a last name of "Manditsch," "Manntitsch," and "Mandytsch," which sound alike phonetically, the same first name "Iwan," the same rank of "*Wachmann*," and who was transferred between camps in a reasonable manner consistent with the historical evidence, they all refer to the same man. (GX 26-28; Tr. 6-14, at 107-08, 192-93).

70. Guard 3308 was named Iwan "Mandytsch" (spelled phonetically), was born on January 23, 1920, and was born in Olievo-Korolivka, Horodenko Rayon. (GX 26-28).

B. Identifying Defendant and Guard 3308

71. Defendant's first name, Iwan, matches that of guard 3308. (GX 26-28).

72. Defendant was born in Olievo-Korolivka, which was the birthplace of Guard 3308. (Compare Stip. Fact (1) at docket entry 115 with GX 28 at entry 10; *see also* GX 30; Tr. 6-14, at 77-79).

73. The SS and police officials conducted a drive for men to serve in guard units in East Galicia and the Horodenka region, the birthplace of Defendant and Guard 3308, in the late winter and early spring of 1943. (Tr. 6-14, at 147-48).

74. Guard 3308's arrival date corresponds with arrivals of recruits from Defendant's birthplace, the Horodenka region. (GX 32-34, 58, 60; Tr. 6-14, at 145-52).

75. The Government of Ukraine has officially certified that one Iwan Mandych was born on January 23, 1920, in Olievo-Korolivka, to parents named Dmytro and Mariya Skits'ko Mandycz. (GX 30).

76. In connection with his application for an immigrant visa to enter the United States, Defendant presented a church birth record, purportedly issued on March 15, 1943 (DX 1). That document lists Defendant's date of birth as July 23, 1920, exactly six months later than the birth date of Guard 3308 and the official Ukrainian records for Iwan Mandycz. (GX 7).

77. Forensic testing on Defendant's church birth record reveals that the stamp impression was created using

multiple stamp operations and inks, and that portions of the printed lettering were re-touched by hand, using multiple inks. (Tr. 6-17 (afternoon) at 35-36, 38-48).

78. Legitimate stamp impressions do not contain such anomalies. (Tr. 6-17 (afternoon) at 48-51).

79. The Court finds that the March 15, 1943, (DX 1) church birth record is not authentic. (Tr. 6-17 (afternoon); GX 30).

80. Defendant admits that his parents were named Dmytro and Maria. (Tr. 6-14, at 81).

81. Additionally, Defendant's immigration documents, for which Defendant supplied the information, state that Defendant's father's name is "Dmytro" and his mother's name is Maria "Skitska" or "Skidzka." (GX 7).

82. In some of Defendant's immigration documents his last name, Mandycz, is rendered "Mandytsch." (GX 7, at 21, 32-33).

83. The spelling "Mandytsch" that appears in Defendant's immigration documents is identical to the spelling of Guard 3308's last name, as listed on the November 20 roster (GX 28).

84. There is no evidence of the existence of a second "Ivan Mandycz" born in Olievo-Korolivka in 1920. (Tr. 6-17 (morning), at 61-62; GX 123 at 157).

85. Based on the inauthentic nature of Defendant's birth certificate and the certification from the Ukrainian

Government that matches Defendant's biographical details in all aspects except the date of birth, the Court finds that Defendant's date of birth was January 23, 1920 (GX 30; ¶¶ 76-79).

86. Guard 3308 shares the same first name, the same last name, the same birthplace, and the same birth date as Defendant. (¶¶ 71, 72, 83, 85).

87. Guard 3308 is Defendant. (¶¶ 86, 84).

C. Corroborating Evidence

88. As discussed in the following findings, Defendant's post-war contacts and statements made by others corroborate and further bolster the finding that Guard 3308 is Defendant.

89. The three rosters (GX 26 at entry 76; GX 27 at entry 104; GX 28 at entry 43) each list a "Nikolai Petrustschak," with Trawniki identification number 3380 and the rank of *Wachmann*. (GX 26-28; Tr. 6-14, at 109).

90. The November 20 roster states that Petrustschak was born on April 7, 1924 in "Wikno." (GX 28 at entry 43; Tr. 6-14, at 94).

91. Because the three rosters each identify Petrustschak by the same first and last names, rank, and Trawniki identification number 3380, they all refer to the same man. (Tr. 6-14, at 192-93).

92. The name "Mykola" is the Ukrainian version of "Nikolai." (Tr. 6-14, at 94).

93. In 1949, Defendant listed a "Mykola Petruszczak," located at a sanatorium (a type of hospital) in Parsch, as a character reference on a questionnaire ("*Fragebogen*") he completed for the International Refugee Organization ("IRO"). (GX 5; Tr. 6-14, at 96-97).

94. An IRO form completed by Mykola Petrusczak corroborates that he was living in a hospital in Parsch in 1949. The form also states that Petrusczak was born on April 7, 1924, in Vikno, the same date and place as Guard 3380. (GX 9 at 34; Tr. 6-14, at 92-94).

95. The "Nikolai Petrustschak" listed on the three rosters as Guard 3380 is the "Mykola Petrusczak" who served as Defendant's post-war character reference. (GX 5; GX 9; GX 26-28).

96. Petrusczak advised the IRO that from April 7, 1943 until 1944, he worked for the Seyring Company in Vienna, and then worked in Pichl. (GX 4; Tr. 6-15 (morning), at 37-38).

97. Defendant also told the IRO that from 1943 to 1944 he worked for the Seuring Company in Vienna, and then worked in Pichl. (GX 5 at 6-7).

98. The Austrian Government has no record that Defendant worked in Austria as a forced laborer during the war, and no evidence was presented that a "Seuring" (or "Seyring") company existed during World War II. (GX 117; GX 119; Tr. 6-15 (morning), at 38-40; Tr. 6-15 (afternoon), at 71, 74-75; Tr. 6-17, at 66-67, 72-74).

99. In his deposition, Defendant denied that he ever worked in Vienna or at a Seuring factory during the war. (GX 123 at 119, 133).

100. The Court finds that the matching statements provided by Defendant and Petrusczak, when compared with the historical evidence, suggest that Defendant and Petrusczak fabricated a shared, false story of their whereabouts during World War II. (¶¶ 92-93, 95-97).

101. This post-war contact corroborates the identification of Defendant and Guard 3308. (¶¶ 87-99).

102. Defendant's identification with Guard 3308 is also corroborated by the postwar protocols of Stepan Perig, Ivan Sidorak, and Vasilij Gajdich. (GX 32-34, 60).

103. The protocols of Perig, Sidorak, and Gajdich were given to Soviet investigators. (GX 32-34, 60; Tr. 6-14, at 99).

104. Those protocols were created according to a method typically employed in many eastern and western European countries. Under this method, an individual questions a witness, and then produces a summary protocol that the witness corrects and then adopts through his signature or an oral acknowledgment. (Fed. R. Civ. P. 28(b) & Advisory Committee's Notes (1963 Amendments); Tr. 6-14, at 98-99; Tr. 6-15 (morning), at 78).

105. If information in post-war protocols given to Soviet investigators, or investigators from another country, can be corroborated by reliable evidence, the

information can be relied upon to reach sound historical conclusions. (GX 25 at 8-9; Tr. 6-17 (morning), at 26-29, 48).

106. On March 15, 1948, and March 28, 1948, Stepan Perig provided signed protocols to Soviet investigators discussing his wartime whereabouts and activities. (GX 32; GX 33; Tr. 6-14, at 97).

107. In both protocols, Perig stated that he was from Olievo-Korolivka, the same hometown as Defendant. (GX 32 at 1; GX 33 at 1; Tr. 6-14, at 100).

108. In both protocols, Perig admitted serving at Trawniki and Poniatowa. (GX 32 at 2-3; GX 33 at 1-2; Tr. 6-14, at 107).

109. Perig is identified on the May 25 roster as "Stefan Perih," guard number 3324, corroborating his Trawniki and Poniatowa service. (GX 26 at entry 24; Tr. 6-14, at 107-08).

110. In both his March 15 and March 28 protocols, Perig stated that "Ivan Dmitrievich Mandych" served with him at Trawniki and Poniatowa, and was then transferred to Germany. (GX 32 at 5; GX 33 at 4; Tr. 6-14, at 100).

111. The name "Dmitrievich" represents a patronymic, which is based on the name of the father. (Tr. 6-14, at 100-01).

112. Because Defendant's father's name was Dmytro, his patronymic is "Dmitrievich." (Tr. 6-14, at 100-01).

113. In both his protocols, Perig recalled that Mandych's year of birth was 1920, that his place of birth was Olievo-Korolivka, and that Mandych's parents still resided in Olievo-Korolivka as of 1948. (GX 32 at 5; GX 33 at 4; Tr. 6-14, at 102-06).

114. In his deposition, Defendant also stated that his parents resided in Olievo-Korolivka after World War II. (GX 123 at 92).

115. According to official death certificates issued by the Government of Ukraine, Defendant's parents were alive in 1948, when Perig provided his protocols, and resided in Olievo-Korolivka until their deaths in the 1950's. (GX 132 & 133; Tr. 6-14, at 104-05).

116. Perig's post-war statements regarding Iwan Mandych corroborate the identification of Guard 3308 and Defendant. (¶¶ 105-114).

117. On December 9, 1947, Ivan Sidorak provided a signed statement to a Soviet investigator discussing his wartime whereabouts and activities. (GX 34; Tr. 6-14, at 109).

118. Sidorak admitted serving at Trawniki and Poniatowa. (GX 34).

119. Sidorak is identified on the three rosters (GX 26 at entry 12; GX 27 at entry 74; GX 28 at entry 13) with the identification number 3312, corroborating his Trawniki and Poniatowa service.

120. Sidorak stated that he served at Trawniki and Poniatowa with an "Ivan Mandych," who was born in

1920 in Olievo-Korolivka. (GX 34 at 6; Tr. 6-14, at 111).

121. Sidorak's post-war statements regarding Iwan Mandych corroborate the identification of Guard 3308 and Defendant. (¶¶ 117-20).

122. On August 28, 1948, Vasilij Gajdich provided a signed statement to a Soviet investigator discussing his wartime whereabouts and activities. (GX 60; Tr. 6-14, at 111-12).

123. Gajdich admitted serving at Trawniki and Poniatowa. (GX 60; Tr. 6-14, at 112).

124. Gajdich is identified on the three rosters (GX 26 at entry 19; GX 27 at entry 80; GX 28 at entry 19) with identification number 3319, corroborating his Trawniki and Poniatowa service.

125. Gajdich stated that he served with an "Ivan Mandich" at Trawniki and Poniatowa. (GX 60 at 3).

126. In 1995, Gajdich provided a statement to Canadian investigators in which he recalled serving at Trawniki with a man with the last name "Mandich," noting that the name was memorable because it sounded like his own name. (DX 21 at 4).

127. In 2000, Gajdich similarly told an attorney from the United States Government that he seemed to recall serving at Trawniki with a man named Mandycz, remembering that Mandycz was from Horodenko, and again noting that the name was memorable because it sounded like his own name. (DX 24 at 74-75).

128. In 2000, Gajdich denied having provided a protocol to Soviet investigators in 1948, and denied ever having served at Poniatowa. (DX 24 at 77-81; Tr. 6-15 (afternoon), at 58-59).

129. Gajdich also stated that, between spring 1943 and fall 1943, when German documents show that he was at Poniatowa, he was "nowhere" and "know[s] nothing more." (DX 24 at 77, 80; Tr. 6-17 (morning), at 9-10).

130. When confronted about his denials, Gajdich admitted, "Maybe I am not truthful. I am not denying that." (DX 24 at 80-81).

131. It is common for individuals to deny knowledge of or participation in atrocities, and because Gajdich was likely present at Poniatowa when approximately 14,000 Jewish prisoners were killed in a single day, his claim that he did not serve at the camp is consistent with that pattern. (Tr. 6-17 (morning), at 10-11).

132. In light of his admission that he might not be telling the truth in denying he provided a 1948 protocol, his claim that he was "nowhere" between spring and fall 1943 when German documents show him serving at Poniatowa, and the fact that in post-war protocols Nazi guards commonly distance themselves from atrocities, Gajdich's claims that he did not provide a protocol in 1948 and that he did not serve at Poniatowa are not credible. (¶¶ 128-29).

133. Gajdich's prior admission that he served at Trawniki and recollection of a man named "Mandich"

corroborate the identification of Guard 3308 and Defendant. (DX 21; DX 24 at 74-75).

134. Defendant's identification with Guard 3308 is also corroborated by his post-war contacts with Petro Perih.

135. Petro Perih, or "Petr Perig, "was recalled by both Ivan Sidorak and Stepan Perig, in separate post-war protocols, as having served with them. Sidorak identified Petro Perih as being from Olievo-Korolivka and serving at Trawniki and Poniatowa. (GX 34 at 7). Stepan Perig also remembered him as being from Olievo-Korolivka and serving at Trawniki. (GX 33 at 3-4; Tr. 6-15 (morning), at 44-46).

136. Canadian immigration documents for Petro Perih state that he was born on April 4, 1924 in Olievo-Korolivka. (GX 17; Tr. 6-15 (morning), at 47).

137. A July 2002 Canadian driver's license record for Petro Perih lists his birth date as April 4, 1924, and identifies his address as 437 Renforth Drive. (GX 18; Tr. 6-15 (morning), at 48).

138. A telephone book for Toronto lists a P. Perih as residing at 437 Renforth Drive, with the telephone number 416-620-9571. (GX 134A, 134B; Tr. 6-15 (morning), at 48).

139. Defendant has admitted that Petro Perih's telephone number is 416-620-9571. (GX 16 at 2).

140. On April 12, 2000, Defendant's telephone records show two calls to a Toronto telephone number of 416-

620-9571. On April 13, 2000, Defendant's telephone records show another call to that number. (GX 20 at 11).

141. Petro Perih attended the wedding of Defendant's daughter. (GX 12 at 17; GX 13).

142. Defendant's post-war contacts with Petro Perih corroborate Defendant's identification with Guard 3308. (¶¶ 135-141).

143. In light of the documentary and corroborating evidence, the variance in physical descriptions of Iwan Mandycz provided in the interrogations are factually insignificant and unpersuasive.

144. Other men who served at Trawniki and Poniatowa failed to identify Defendant in post-war statements, or did not recall Defendant's name (or the names of many others) in interviews. (DX 7-23; GX 79, 84, 109, 110; Tr. 6-15 (afternoon), at 8, 11, 13, 15-16, 20-21, 34-35, 37, 47-51; Tr. 6-17 (morning), at 52, 60).

145. Those failed recollections do not impeach or overcome the corroborating evidence of the statements that do recall an Ivan Mandycz.

146. Defendant has suggested no reason, and none is apparent, that Soviet investigators would seek to falsely incriminate him for World War II conduct. (Tr. 6-17 (morning), at 47; *see also United States v. Stelmokas*, 100 F.3d 302, 313 (3d Cir. 1996); *United States v. Lileikis*, 929 F. Supp. 31, 38 (D. Mass.

1996); *Kalejs v. INS*, 10 F.3d 441, 447 (7th Cir. 1993)).

147. Furthermore, Defendant's name does not appear on a Soviet wanted list or all points bulletin, indicating that the Soviets were not actively searching for him. (Tr. 6-15 (afternoon), at 68; 6-17 (morning), at 47).

148. In 1995, three men told Canadian authorities that Soviet investigators coerced or falsified confessions from them in the 1940's. (DX 13, 15, 17)

149. In their statements, all three men contradict reliable historical evidence indicating that each participated in Nazi service. Their statements avoided implicating themselves in atrocities and other bad acts. (Compare DX 13 at 3-5, with GX 53, GX 95 at entry 58, GX 26 at entry 64, and Tr. 6-17 (morning), at 44-46; compare DX 15, with GX 95 entry 50, GX 26 at entry 63, and Tr. 6-17 (morning), at 32-35; and compare DX 17, with Tr. 6-17 (morning), at 40-43).

150. Those contradictions undermine the credibility of the men regarding their claims of coerced, false confessions; to support their present stories, the men had to disavow prior statements in which they acknowledged historically documented wartime conduct. (Tr. 6-17 (morning), at 39-40, 43, 46-47).

151. The Court also notes that coerced confessions are not necessarily false confessions.

152. The claims of coerced interrogations does not impeach or undermine the Court's finding that Defendant is Guard 3308. (¶¶ 148-151).

153. Iwan Mandycz does not possess a Waffen-SS blood-type tattoo, or a scar indicating that he previously had such a tattoo. (GX 123 at 128, 134).

154. The German wartime practice of issuing blood-type tattoos to members of the Waffen-SS was haphazard. Thus, although the presence of such a tattoo on an individual is indicative of a Waffen-SS affiliation, the absence of such a tattoo does not entail that an individual did not serve the Nazis. (Tr. 6-15 (afternoon), at 65-66).

155. In 1948, Congress enacted the Displaced Persons Act ("DPA"), to assist European refugees rendered homeless by the war in emigrating to the United States. (Pub. L. No. 80-774, ch. 647, 62 Stat. 1009; DeCapua Dep. at 19-20).

156. Mario DeCapua, whose testimony was provided by deposition, is qualified to testify as an expert on the eligibility standards for immigration under the DPA, and the process used to screen and approve applicants under the DPA. (DeCapua Dep. at 18, Fed. R. Evid. 702). The Court considers his testimony to be credible.

157. The Displaced Persons Commission ("DPC") administered the DPA. Before applicants could apply to the DPC for eligibility determinations, the DPA required that applicants first seek and obtain certification from the International Refugee Organization ("IRO") that they were displaced persons and "of concern" to the IRO by virtue of their wartime and post-war experiences, as defined in Annex I of the IRO Constitution. (DPA, § 10, 62 Stat.

1013; *United States v. Kowalchuk*, 773 F.2d 488, 492-94 (3d Cir. 1985) (en banc); DeCapua Dep. at 24-25).

158. An applicant who obtained IRO certification as an eligible displaced person could then apply to the DPC to determine his eligibility for an immigrant visa under the DPA. (*See Kowalchuk*, 773 F.2d at 492; DeCapua Dep. at 24-25).

159. As part of his attempt to obtain IRO certification, Defendant completed and signed an IRO questionnaire, or "*Fragebogen.*" (GX 5; DeCapua Dep. at 26-28).

160. On his *Fragebogen*, Defendant claimed that he had remained in Olievo-Korolivka until 1943, when he was taken by the Germans to Austria as a forced laborer. Defendant further claimed that from 1943 to 1944, he worked as a forced laborer in Vienna, at the Seuring Company. (GX 5).

161. The statements in the *Fragebogen* are false and misleading, as they conceal and omit reference to Defendant's service as Guard 3308. (Compare GX 5 with ¶¶ 1-86).

162. Based on his statements, Defendant was certified as an eligible displaced person by the IRO. (GX 5; GX 7).

163. The DPA also vetted the applicants through a background investigation. (DeCapua Dep. at 26-28).

164. The United States Army's Counter Intelligence Corps ("CIC") conducted the background investigations and

interviewed applicants on behalf of the DPC. (DeCapua Dep. at 27).

165. In conducting its investigation, CIC investigators would interview each applicant. (DeCapua Dep. at 27, 29).

166. The CIC checked the consistency of the applicant's background information with the information given to the IRO, and investigated whether the applicant had assisted in persecution during the war, or was a member of or participated in a movement hostile to the United States. (DeCapua Dep. at 27-28).

167. The CIC had no access to information possessed by entities in countries that fell under Soviet occupation. (DeCapua Dep. at 28-29, 61).

168. Because the information from the Soviet occupied countries was unavailable, the CIC's primary source of information in certain cases was the applicant himself. (DeCapua Dep. at 27, 29).

169. Following its investigation, the CIC submitted a written report to the DPC. (DeCapua Dep. at 29).

170. Based on the information available at that time, the CIC concluded that there was "no evidence" reflecting adversely on Defendant's background sufficient to affect his eligibility for immigration under the DPA, and that there was "no evidence" he had been a member of or participated in a hostile movement. (DeCapua Dep. at 29-31).

171. There is no evidence that the CIC inquired into, or was able to ascertain, whether a Seuring Company existed during World War II. (GX 5; DeCapua Dep. at 51; Tr. 6-17 (morning), at 69-70, 82, 85).

172. Defendant told the CIC the same information that he told the IRO; any discrepancies in his story would have been noted as "derogatory information. " (GX 5; DeCapua Dep. at 32).

173. Standard procedure called for DPC Case Analysts to review the file of each applicant and determine whether an applicant was eligible and desirable for displaced person status and entry into the United States. The file included information provided by the applicant as well as information received from the IRO and CIC. (Stip. Fact (8) at docket entry 115; DeCapua Dep. at 32-33).

174. The DPC generally did not duplicate the CIC's work by interviewing the applicants again. Rather, DPC Case Analysts relied on the information contained in the IRO and CIC files. (GX 1 at 5; DeCapua Dep. at 52-53, 64).

175. At the conclusion of its screening process, the DPC issued a report on the applicant's eligibility. (GX 1 at 5).

176. Defendant's DPC report cannot be located. Regardless, the Court finds that Defendant did undergo the DPC screening process, since other forms in evidence are exclusive to the DPC, and since his visa application indicates that he was processed under

"PL 774," which refers to the DPA. (GX 1 at 6; GX 5; DeCapua Dep. at 33).

177. Defendant omitted and concealed his Trawniki training and his service as a guard at the Trawniki and Poniatowa forced labor camps throughout the immigration process; such information would have been noted in the CIC report as "derogatory." (GX 5; GX 7; DeCapua Dep. at 31).

178. The DPC never learned that Defendant had been a Trawniki-trained guard at Nazi forced labor camps or a member of the Guard Forces of the SS and Police Leader in Lublin District. (DeCapua Dep. at 34-35, 69).

179. Certification as eligible by the DPC was a prerequisite to consideration for a DPA visa in 1949. (GX 1 at 5; DeCapua Dep. at 53).

180. On December 1, 1949, Defendant completed, signed and submitted a sworn "Application for Immigration Visa," on which he again claimed to have been in Austria from May 1943 to the date of his application. (GX 7; Stip. Fact (9) at docket entry 115).

181. Based upon the information provided by Defendant to the United States, an immigrant visa was issued to Defendant under the DPA on December 2, 1949. (Stip. Fact (11) at docket entry 115).

182. Defendant entered the United States at the Port of New York on December 27, 1949. (Stip. Fact (12) at docket entry 115).

183. On or about May 13, 1955, Defendant filed an Application to File Petition for Naturalization with the United States Immigration and Naturalization Service and orally swore to the truth of the information he provided therein. (Stip. Fact (13) at docket entry 115; GX 7).

184. On June 30, 1955, the United States District Court for the Eastern District of Michigan granted Defendant's Petition for Naturalization and issued him Certificate of Naturalization No. 7535606. (Stip. Fact (14) at docket entry 115; GX 7).

185. Defendant has resided in the Detroit Metropolitan area ever since his naturalization. (GX 123 at 19; GX 7).

186. At his deposition for this case, Defendant recounted that he was taken from his home to work on a farm in Linz during World War II. He stated that he lived in a complex with approximately 25 barracks, and was taken each day to work on a different farm. (Tr. 6-15 (morning), at 41-43).

187. That story is the same one Defendant told his adult daughter throughout her life, before the onset of Defendant's health problems, thus indicating Defendant's lucidity at his deposition. (GX 135).

188. Defendant's story is inconsistent with the historical record, because forced farm workers taken to perform labor in the Reich during World War II primarily worked on one farm at a time, where they lived with only a few other laborers. (Tr. 6-15 (morning), at 42-43).

189. Defendant has presented no historical documentation or other evidence to substantiate his claim that he was a forced laborer working on a farm in Linz during World War II. (Tr. 6-15 (morning), at 44).

190. The Court finds Defendant's account to lack credibility because of its inconsistency with the historical evidence and the corroborating statements discussed above. (Compare 186 with ¶¶ 1-154).

191. No credible evidence undermines the conclusion that Defendant served as Guard 3308.

192. The identification of Defendant and Guard 3308, as well as the relevant conduct of Guard 3308, has been shown by clear, convincing, and unequivocal evidence. (¶¶ 1-154).

III. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

193. This Court has jurisdiction over this matter under 28 U.S.C. § 1345, which provides district courts with original jurisdiction for civil actions brought by the United States.

194. Jurisdiction is also proper under 8 U.S.C. § 1451 (a), which provides district courts with original jurisdiction for denaturalization actions.

195. Venue is proper in this district because it is the district in which Defendant resides. 8 U.S.C. § 1451(a); ¶ 185.

B. Legal Standard

196. The Government must prove its case by evidence that is clear, convincing, and unequivocal. *Kungys v. United States*, 485 U.S. 759, 772, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (citation omitted); *Fedorenko v. United States*, 449 U.S. 490, 505, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981) (citation omitted); *United States v. Dailide*, 227 F.3d 385, 389 (6th Cir. 2000) (citing *Fedorenko*).

C. Naturalization and the Displaced Persons Act

197. If naturalization was "illegally procured," then the grant of citizenship "can be set aside." 8 U.S.C. § 1451(a); *Dailide*, 227 F.3d at 389 (citation omitted).

198. Naturalization is illegally procured if there has not been "strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko*, 449 U.S. at 506; *see* 8 U.S.C. § 1451(a); *United States v. Demjanjuk*, 367 F.3d 623, 629 (6th Cir. 2004) (citing *Fedorenko*); *Dailide*, 227 F.3d at 389 (citing *Fedorenko*).

199. One legal prerequisite to the acquisition of citizenship is that the individual have entered this country under a valid visa. *See Fedorenko*, 449 U.S. at 514-15; *United States v. Dailide*, 316 F.3d 611, 618 (6th Cir. 2003); *Demjanjuk*, 367 F.3d at 629, 636 (citing *Dailide*).

200. In 1949, the criteria for a "displaced person" eligible for entry into the United States under the Displaced Persons Act ("DPA"), incorporated the eligibility

criteria of the International Refugee Organization ("IRO"). 62 Stat. 3037-3055; *See Dailide*, 227 F.3d at 390; *United States v. Koreh*, 59 F.3d 431, 438 (3d Cir. 1995).

C. Defendant Assisted the Enemy in Persecuting Civil Populations

201. Annex I, Part II of the IRO Constitution excluded certain categories of persons from "the concern" of the IRO, including "any [] persons who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries." (Annex I, Part-II, Section 2(a), reprinted in 62 Stat. 3051 (1948); GX 6 at 151); *See Fedorenko*, 449 U.S. at 496 n.4; *Dailide*, 227 F.3d at 390; *Koreh*, 59 F.3d at 438.

202. Persecution refers to "the infliction of sufferings, harm, or death upon those who differ . . . in a way regarded as offensive" and "a campaign having for its object the subjugation or extirpation of the adherents of a religion." *United States v. Sokolov*, 814 F.2d 864, 874 (2d Cir. 1987) (quoting Webster's Dictionary); *Koreh*, 59 F.3d at 440 (quoting *Sokolov* for the definition of persecution).

203. Applicants bore the burden of proof in establishing their eligibility as displaced persons under the DPA. DPA § 10, 63 Stat. 1013.

204. A defendant need not have *personally* or *voluntarily* participated in particular acts of persecution in order to qualify as having assisted in persecution within the meaning of the law; "an individual's service in a unit dedicated to exploiting and exterminating civilians on

the basis of race or religion constitutes assistance in persecution." *Demjanjuk*, 367 F.3d at 637 (citing *Fedorenko*, 449 U.S. at 512 and *Dailide*, 227 F.3d at 390-91); *United States v. Ciurinskas*, 148 F.3d 729, 734 (7th Cir. 1998); *United States v. Breyer*, 41 F.3d 884, 890 (3d Cir. 1994); *Szehinskyj*, 277 F.3d 331, 334 (3d Cir. 2002). *See also Hammer v. INS*, 195 F.3d 836, 843-844 (6th Cir. 1999).

205. In interpreting Section 2(b) of the DPA, the Supreme Court has held, "an individual's service as a concentration camp armed guard -- whether voluntary or involuntary -- made him ineligible for a visa." *Fedorenko*, 449 U.S. at 512; *Demjanjuk*, 367 F.3d at 637; *Dailide*, 227 F.3d at 390-391.

206. An individual can assist in persecution without being armed; therefore a defendant need not have been armed to establish that he assisted in persecution. *See Dailide*, 227 F.3d at 393 ("whether [Defendant, who conducted prison interviews,] was armed or unarmed, these defenseless Jewish civilians were at his mercy").

207. Defendant, as Guard 3308, served as an armed guard of Jewish civilians at the Trawniki Labor Camp, which constituted assistance in persecution of civil populations under Section 2(b) of the DPA. *See United States v. Wasylyk*, 162 F. Supp. 2d 86, 93-94 (N.D.N.Y. 2001) (guard service at Budzyn forced labor camp); *United States v. Hajda*, 963 F. Supp. 1452, 1461 (N.D. Ill. 1997) (guard service at Trawniki and elsewhere), *aff'd*, 135 F.3d 439 (7th Cir. 1998); *United States v. Schiffer*, 831 F. Supp. 1166, 1198-99 (E.D. Pa. 1993) (guard service at Trawniki and elsewhere), *aff'd*, 31 F.3d 1175 (3d Cir.

1994); *see also Fedorenko*, 449 U.S. at 512 (concentration camp guard service renders applicant ineligible under DPA); *Breyer*, 41 F.3d at 890 (same).

208. Defendant, as Guard 3308, also served as an armed guard of Jewish civilians at the Poniatowa Labor Camp, which constituted assistance in persecution of civil populations within the meaning of Section 2(b) of the DPA and the IRO Constitution. *See Wasylyk*, 162 F. Supp. 2d at 94; *Hajda*, 963 F. Supp. at 1461, *aff'd*, 135 F.3d 439 (7th Cir. 1998); *Schiffer*, 831 F. Supp. at 1199, *aff'd*, 31 F.3d 1175 (3d Cir. 1994); *see also Fedorenko*, 449 U.S. at 512; *Breyer*, 41 F.3d at 890.

209. Even if Defendant did not serve voluntarily or personally commit acts of persecution, his "service in a unit dedicated to exploiting and exterminating civilians on the basis of race or religion constitutes" assistance in persecution within the meaning of the DPA. *Demjanjuk*, 367 F.3d at 637; *see Ciurinskas*, 148 F.3d at 734 ("Even if [Defendant] had not personally participated, his service in [a group that performed mass executions of Jews] is sufficient to constitute assistance in persecution, as set out in § 2(b) of the DPA and the IRO Constitution . . . . We see little difference between being a concentration camp guard . . . and being a member of a force dedicated to the extermination . . . of civilians.").

210. Defendant's active membership in the Guard Forces from April until November 1943 constitutes assistance in persecution under Section 2(b) of the DPA. *See* ¶ 5-10; *Demjanjuk*, 367 F.3d at 637; *Ciurinskas*, 148

F.3d at 734; *United States v. Osidach*, 513 F. Supp. 51, 99 (E.D. Pa. 1981).

211. The Government has proved by clear, unequivocal, and convincing evidence that Defendant assisted in the persecution of civilian populations during World War II. (¶¶ 1-192).

212. Because of his assistance in persecution, Defendant was ineligible to immigrate to the United States. DPA § 2(b), 62 Stat. 1013 (1948).

213. Defendant's entry to the United States for permanent residence in 1949 was therefore unlawful and his naturalization as a United States citizen was illegally procured. *See Demjanjuk*, 367 F.3d at 637; *Dailide*, 227 F.3d at 395; *Stelmokas*, 100 F.3d at 319 n.1.

D. Defendant was a Member and Participated in a Movement Hostile to the United States

214. Section 13 of the DPA also prohibited the issuance of a visa to any applicant who "is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States." 62 Stat. 1014; 64 Stat. 227. *See Koreh*, 59 F.3d at 443.

215. The plain language of this statute indicates that either membership or participation in a hostile movement is sufficient to prohibit the issuance of a visa. 62 Stat. 1014; 64 Stat. 227.

216. A list of organizations considered hostile movements under Section 13 was compiled in a document known as the "Inimical List." (GX 2-3).

217. The fact that an organization does not appear on the "Inimical List" is not dispositive of its status as a hostile movement. *See United States v. Kowalchuk*, 773 F.2d 488, 496 (3rd Cir. 1985) (member of Ukrainian schutzmannschaft "would have been rejected even though the Ukrainian schutzmannschaft was not on a list of inimical organizations"); *United States v. Koreh*, 856 F. Supp. 891, 902 ("every case which has considered the movement hostile provision of the DPA has concluded that employment by an organization which aided the enemies of the United States, in a position that entailed compliance with or promotion of the policies of that organization, constituted participation and membership in a movement hostile - [inimical] list or no list"), *aff'd*, 59 F.3d 431 (3rd Cir. 1995).

218. The Guard Forces constitute a movement hostile to the United States under Section 13 of the DPA, even though the Guard Forces do not appear on the Inimical List. *See Kwoczak*, 210 F. Supp. 2d 638, as amended, No. 96-5632, 2002 U.S. Dist. LEXIS 22271, 2002 WL 32137688, at *3 (E.D. Pa. Nov. 1, 2002); *Hajda*, 963 F. Supp. at 1461 (member of Guard Forces who guarded at Trawniki and Treblinka labor camp was member of a movement hostile to the United States).

219. Service as an armed guard at a Nazi-operated camp constitutes participation in a movement hostile to the United States under Section 13 of the DPA. *United States v. Negele*, 222 F.3d 443, 447 (8th Cir. 2000)

(concentration camp guard) (citing *Breyer*, 41 F.3d at 890).

220. The degree of participation or involvement in the hostile movement is irrelevant. *Koreh*, 59 F.3d at 444-45 (citing *Osidach*, 513 F. Supp. at 72).

221. A defendant's participation in a hostile movement need not be voluntary. *See Ciurinskas*, 148 F.3d at 734; *but see Koreh*, 59 F.3d at 444 (indicating in dictum that although personal participation need not be proven, willing membership was still required).

222. Clear, unequivocal, and convincing evidence demonstrates that Defendant participated in a movement hostile to the United States under the DPA through his guard service at the Trawniki Labor Camp as Guard 3308. *See Negele*, 222 F.3d at 447; *Breyer*, 41 F.3d at 890-91; *Hajda*, 963 F. Supp. at 1461.

223. Clear, unequivocal, and convincing evidence demonstrates that Defendant participated in a movement hostile to the United States under the DPA through his guard service at the Poniatowa Labor Camp as Guard 3308. *See Negele*, 222 F.3d at 447; *Breyer*, 41 F.3d at 890-91; *Hajda*, 963 F. Supp. at 1461.

224. As a matter of law, and because the Government has established Defendant's participation in the movement, the Government need not show that Defendant's membership in the Guard Forces was willing. *Ciurinskas*, 148 F.3d at 729.

225. Nonetheless, Defendant's service may be considered willing or voluntary because he was paid, eligible for leave and benefits, and there is no evidence he sought to desert or flee. *Ciurinskas*, 148 F.3d at 729. Cf. *Koreh*, 59 F.3d at 444.

226. Clear, unequivocal, and convincing evidence demonstrates that Defendant was a member of a movement hostile to the United States under the DPA through his service and membership in the Guard Forces. *See Hajda*, 963 F. Supp. at 1461; *see also Koreh*, 59 F.3d at 431; *Sokolov*, 814 F.2d 864; *Koziy*, 728 F.2d 1314.

227. Because of his membership and participation in a movement hostile to the United States, Defendant was ineligible to immigrate to the United States under Section 13 of the DPA. 62 Stat. 1014; 64 Stat. 227.

228. Defendant's entry into the United States for permanent residence in 1949 was therefore unlawful and his naturalization as a United States citizen was illegally procured. *See Negele*, 222 F.3d at 447.

IV. ORDER

ACCORDINGLY, IT IS HEREBY ORDERED that the United States citizenship of Defendant Iwan Mandycz is **REVOKED.**

IT IS FURTHER ORDERED that the order of the United States District Court for the Eastern District of Michigan, Southern Division, dated June 30, 1959, admitting Defendant to United States citizenship is **VACATED.**

IT IS FURTHER ORDERED that Defendant's Certificate of Naturalization, number 7535606, is **CANCELLED.**

IT IS FURTHER ORDERED that Defendant is **ENJOINED** from claiming any rights, privileges, benefits, or advantages of United States citizenship.

IT IS FURTHER ORDERED that Defendant shall **SURRENDER AND DELIVER** within fourteen (14) days of service of this order his Certificate of Naturalization number 7535606, his expired or unexpired United States passports, if any, and any other formal indicia of United States citizenship.

SO ORDERED.

Dated: February 28, 2005

s/Paul V. Gadola
HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE